IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1755

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - - Petitioner

versus

JOHN E. HAYCRAFT, et al. - - - Respondents

versus

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - Respondents

(Other respondents named on inside cover)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Additional Respondents in this case are Lyman Johnson, Richard Miller, Aaron Howard, John Schmidt, Earl Alluisi, John R. Hughes, Sarah White, Johnie Wright, Suzanne Post, Hazel K. Lane, American Federation of Teachers, Jefferson County Federation of Teachers, Local 672, and the Kentucky Human Relations Commission.

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TABLE OF AUTHORITIES

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No. _____

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - *Petitioner*

v.

JOHN E. HAYCRAFT, et al. - - *Respondents*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, L. J. Hollenbach, III, County Judge of Jefferson County, Kentucky, respectfully prays that a writ of certiorari issue to review the decision rendered in this case on March 11, 1977, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The order of the Court of Appeals for the Sixth Circuit herein sought to be reviewed was entered on March 11, 1977. That order affirms the Memorandum Opinion and Order and the Judgment of the United

States District Court, Western District of Kentucky, entered on May 18, 1976. All these aforesaid opinions and orders are unreported and are therefore reproduced in the Appendix attached hereto.

Earlier opinions and judgments of the courts in this case include the following: The original Memorandum Opinion and Judgment of the District Court holding that the school systems of Jefferson County were unitary were handed down by the District Court on March 8, 1973 in the consolidated class actions, *Newburg Area Council, Inc.* v. *Board of Education of Jefferson County, Kentucky,* No. 7045 (W. D. Ky.) and *Haycraft* v. *Board of Education of Louisville, Kentucky,* No. 7291 (W. D. Ky.). These were reversed by the Sixth Circuit in *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 489 F. 2d 925 (6th Cir., 1973).

Following these decisions there have been a number of other opinions and orders in this case not directly related to this petition, including actions by this Court. These include *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 489 F. 2d 925 (6th Cir., 1973), vacated, 418 U. S. 918 (1974); *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 510 F. 2d 1358 (6th Cir., 1974); *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 510 F. 2d 1358 (6th Cir., 1974), *cert. den.,* 421 U. S. 937 (1975); *Newburg Area Council* v. *Gordon,* 521 F. 2d 578 (6th Cir., 1975); *Cunningham* v. *Grayson,* 541 F. 2d 538 (6th Cir., 1976);

and *Cunningham* v. *Grayson,* 541 F. 2d 538 (6th Cir., 1976), *cert. den.,* —— U. S. —— (1977), 97 S. Ct. 812, *rehearing den.,* —— U. S. —— (1977), 45 L. W. 3635.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered on March 11, 1977. This petition for writ of certiorari was filed within ninety days of that order. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE QUESTION PRESENTED

The Sixth Circuit having found some incidences of state imposed segregation and having reversed the District Court decision that the school board was operating a unitary system, was the District Court thereafter required to remove the racial identifiability of every school in Jefferson County, so that the admission by Petitioner's expert that his desegregation plan would not accomplish this result necessitated its rejection and the dismissal of this Petitioner?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision relevant to issues in this case is Amendment XIV, Section 1, United States Constitution, which states:

> "No State shall . . . deny any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

The consolidated class actions from which the present controversy arises were filed on August 27, 1971 and June 22, 1972. Those actions alleged that black students in the public school systems in Louisville and Jefferson County were unlawfully discriminated against in violation of the Fourteenth Amendment.

The District Court dismissed these complaints and commended the defendant school systems for their early compliance with this Court's decision in *Brown* v. *Board of Education of Topeka I*, 347 U. S. 483 (1954). This decision, however, was appealed by the plaintiffs, and on December 28, 1973, the Court of Appeals for the Sixth Circuit reversed the District Court. *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky*, 489 F. 2d 925 (6th Cir., 1973). It was the opinion of the Sixth Circuit that because the open transfer policy of the city school system was having a segregative effect and because the county school system had allowed the reconstruction of a predominantly all-black school following a fire in which it was destroyed, the city and county school systems had not eliminated all vestiges of state-imposed segregation. The Sixth Circuit also commented critically on the fact that many schools in the center city were identifiably "black." The Court then remanded the case to the District Court for formulation of a desegregation plan.

On July 30, 1975 the District Court entered its plan requiring that certain racial quotas be met in every

school in Jefferson County. These quotas varied from 12 to 40 percent black in the elementary schools and from 12½ to 35 percent black in the middle schools and high schools. In order to meet these racial quotas, substantial cross-county busing was required and was ordered by the District Court.

Because of the great dissatisfaction with the District Court's plan, on October 8, 1975, this Petitioner moved to intervene in this action. It was Petitioner's position that as the county's chief executive officer* elected by all the people of Jefferson County he was uniquely capable of offering alternative desegregation plans which would be more workable while at the same time fully restoring the plaintiffs to their constitutional rights. A hearing was held on this motion on December 12, 1975, and on December 22, 1975, the District Court allowed the Petitioner to intervene.

Pursuant to the further order of the District Court, on April 22, 1976, the Petitioner filed his alternative desegregation plan which had been designed by Dr. James S. Coleman,** a nationally known sociologist and professor at the University of Chicago.

The basic elements of Dr. Coleman's alternative desegregation plan*** were as follows: (1) those three

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*Although called a "County Judge," this office combines executive, legislative and judicial power under a single authority. In Jefferson County, however, the primary responsibilities of the County Judge are executive in nature.

**Dr. Coleman is the author of the "Coleman Report," a national study authorized by the Civil Rights Act of 1964 under the auspices of the United States Office of Education and completed in 1966. This study is often credited with having provided the sociological basis for requiring massive busing to achieve racial balance in American schools, a conclusion with which Dr. Coleman now strongly disagrees.

***This plan is contained in the appendix below to the Court of Appeals on pages 9-31.

county schools (i.e., Price, Cane Run and Newburg) which the Sixth Circuit found inappropriately located or districted, would be manditorily redistricted to reflect as closely as possible the racial makeup of the school system as a whole; (2) attendance zones at all other schools in the system were to be drawn so as to produce as much integration as possible on a neighborhood basis; (3) any child could transfer out of his neighborhood school to any other school in the system where such a transfer would have an integrative effect; (4) transfers would not be allowed where they tended to have a segregative effect*; (5) neighborhood school enrollments were to be limited in such a manner as to allow room for integrative transfers up to at least fifteen percent** of the school's enrollment; (6) principals of all schools would be encouraged to design and implement programs which would draw students of that race otherwise under-represented; (7) there would be established a number of traditional and other specialty schools (i.e., magnet schools) to encourage enrollment redistribution on an integrative basis and to upgrade the educational quality of the school system; and (8) all necessary transportation to implement this desegregation plan would be provided by the school system.

*The purpose of this transfer limitation was to correct that defect in the open transfer policy of the city system which the Sixth Circuit held to be unconstitutional. Thus, only integrative transfers would be permitted.

**On account of declining enrollment in the past two years, all blacks who wished to transfer away from schools which might otherwise be predominantly black could now be absorbed into schools which are predominantly white.

The hearings on this alternative desegregation plan began on May 3, 1976. Petitioner began the introduction of his proof on May 4, 1976. His first witness was Professor James S. Coleman, the originator of the plan. During the course of his cross-examination, Dr. Coleman was asked whether or not his plan would remove the racial identifiability of all the schools in Jefferson County.* In response to that question he stated that in his opinion neither his plan nor any other plan could successfully accomplish that result within the quota limitations which the court established.** Petitioner's counsel argued that the elimination of the racial identifiability of every school in the Jefferson County school system was not synonymous with the constitutional necessity of removing the vestiges of state imposed segregation and was not constitutionally required in the case at hand. But the District Court

*This question and the related discussion hereinafter summarized are contained in the appendix below to the Court of Appeals beginning on page 99.

**The wording of the District Court's Memorandum Opinion and Order appears to attribute to Dr. Coleman the statement that his plan would not "eliminate all remaining vestiges of state-imposed segregation in the Jefferson County school system." The reason for this is that the District Court views that phrase as being synonymous with "eliminating all racial identifiability from every school in the Jefferson County school system." Petitioner, however, believes that these two phrases are distinguishable. A "vestige of state imposed segregation" is necessarily the result of wrongful state action, while "racially identifiable schools" are not. In response to a question by the District Court, Dr. Coleman admitted that his plan could not eliminate the racial identifiability of every school. He did not, however, suggest that his plan would not eliminate "all vestiges of state-imposed segregation." On the contrary, Petitioner has steadfastly maintained that the Coleman plan will eliminate all vestiges of state imposed segregation and that it complies with all other constitutional requirements set forth by this Court.

disagreed. The concession by Dr. Coleman that his plan would not eliminate the racial identifiability of every school in Jefferson County, in the Court's opinion, required the dismissal of this Petitioner.

The District Court, therefore, ignored any further entreaty by this Petitioner that he be allowed to continue with the proof of his plan. The failure of the Coleman plan to assure some degree of racial balance in every school was fatal. Consequently, on May 18, 1976, the District Court entered both a Judgment (App., *infra,* p. 30) and a Memorandum Opinion and Order (App., *infra,* pp. 27-29) effecting such dismissal.

The Petitioner appealed the decision of the District Court. However, on March 11, 1977, upon motion of Thomas L. Hogan, counsel for certain Respondents, the Court of Appeals for the Sixth Circuit dismissed Petitioner's appeal prior to oral argument (App., *infra,* pp. 25-26). It is that decision of the Sixth Circuit which Petitioner now seeks to review by writ of certiorari from this Court.

The issue presented in this petition is quite simple and is as follows: Does the Constitution require the elimination of all racial identifiability (that is, does it require some racial balancing) in every school once there has been a finding of some state segregative action? The Petitioner believes that it does not.*

*The contrary view of the lower courts on this question might be best illustrated by the statements of the District Court made on May 3, 1976:

"And, if so, if such widens the bridge of racial identification, then it is my concern . . . If the widening of that

(Footnote continued on following page)

REASONS FOR GRANTING THE WRIT

I. The Rejection of the Coleman Plan for the Reasons Given by the Courts Below Conflicts With the Decisions of This Court.

Solely as a consequence of Dr. Coleman's testimony that his alternative desegregation plan would not eliminate all racially identifiable schools in Jefferson County, the Coleman plan was found to be constitutionally infirm by the lower courts.

Yet it has never been thought in this case that the racial imbalance in most of the system's racially identifiable schools was the result of state action. Indeed, in its original decision in this case, the District Court specifically held that the racial composition of these schools merely reflected the racial makeup of the neighborhoods in which those schools were located. This finding has remained undisturbed by the Court of Appeals.

Nevertheless, because of the conclusion that there had been some *de jure* segregation in Jefferson County, the courts below have concluded that no racially identifiable schools can now be tolerated. This conclusion clearly conflicts with the decisions of this Court. Contrary to the courts below, even in a system which has

(Footnote continued from preceding page)

bridge of identification is attempted to be excused . . . then that will be unacceptable. * * *

"And the determination of whether or not a school is predominantly black or predominantly white is a very simple one to me, and I drive by it, and I want to see how many black faces there are. That is all. I don't care about the rest of it. * * * That is the keystone." (See Transcript of Proceedings of May 3, 1976, contained in the appendix below to the Court of Appeals, pages 37-38.)

once practiced segregation by law, "the constitutional command to desegregate schools does not mean that every school . . . must always reflect the racial composition of the school system as a whole." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 24 (1971).

As this Court further pointed out in *Swann, supra,* if the district court in that case had required any degree of racial mixing "as a matter of substantive constitutional right, that approach would be disapproved and we would be obliged to reverse." For the existence of "one race, or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law." *Swann, supra,* 402 U. S. at 26.

What the Constitution requires and what the Coleman plan provides is that no person be effectively excluded from a school on account of his race or color. See *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19 (1969). What is really at stake is "the personal interests of the plaintiffs in admission to public schools as soon as possible on a non-discriminatory basis." *Brown* v. *Board of Education of Topeka II,* 349 U. S. 294, 300 (1954). Or as this Court stated in *Swann, supra,* 402 U. S. at 23:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly on account of race . . ."

At no time has it ever been suggested by Respondents that without the wrongful state action found to exist by the court below, all the schools in Jefferson County would now be balanced to a greater extent than that provided by the Coleman plan. The Petitioner has asserted, and it has not been disputed or denied by Respondents, that all the wrongful state actions are successfully corrected by the Coleman plan. Since "as with any equity case, the nature of the violation determines the scope of the remedy," *Swann, supra,* 402 U. S. at 15, the removal of the racial identifiability of every school in Jefferson County seems unnecessary under the facts of this case.

The Coleman plan was designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct," *Milliken* v. *Bradley,* 418 U. S. 717, 746 (1974), and the conclusion of the lower courts that such action is constitutionally insufficient is patently at odds with the decisions of this Court. For as has been stated by Justice Powell under circumstances different from those in this case:

> "It is, indeed, a novel application of equitable power—not to mention a dubious extension of constitutional doctrine—to require so much greater degree of forced school integration that would have resulted from purely natural and neutral nonstate causes." *Keyes* v. *School District No. 1.* 413 U. S. 189, 249 (1973), Powell, J., partly concurring, partly dissenting."

This Court has long made it clear that even in a system which has once practiced segregation by law,

a school does not offend the Constitution simply because it is racially identifiable. Thus, in *Milliken* v. *Bradley, supra,* this Court specifically disallowed the use of an interdistrict remedy designed to remove the racial identifiability of both the urban and suburban schools in the Detroit area. Moreover, the Court reached this decision despite the undisputed conclusion of the district court that in the absence of including the suburban school district, "the racial composition of the student body was such, that the plan's implementation would clearly make the entire Detroit public school system *racially identifiable* leaving many of its schools 75 to 90 percent black." *Milliken, supra,* 418 U. S. at 1088. (Italics added.)

Other decisions of this Court also support the conclusion that a school does not offend the Constitution simply because it is racially identifiable. One such decision is *Pasadena City Board of Education* v. *Spangler,* —— U. S. ——, 96 S. Ct. 2697 (1976). For in *Pasadena* this Court held that once a unitary system was achieved and schools became racially identifiable only as a consequence of demographic factors, the district court could not thereafter eliminate such racial imbalances.

Thus, as interpreted by this Court, the Constitution does not require the elimination of all racially identifiable schools where such racial character is not the result of wrongful state action. What the Constitution prohibits, and what the Coleman plan will eliminate, is a "current condition of segregation resulting from intentional state action . . . ." *Washington* v. *Davis,*

426 U. S. 220, 96 S. Ct. 2040, 2048 (1976). State actions are not unconstitutional solely because they have a "racially disproportionate impact,"* *Washington* v. *Davis, supra,* 96 S. Ct. at 2047, but rather they must reflect a racially discriminatory purpose or intent:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause . . . ." *Washington* v. *Davis, supra,* 96 S. Ct. at 2048.

The principles of *Washington* v. *Davis* have twice recently been reaffirmed by this Court, once in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* —— U. S. ——, 97 S. Ct. 555 (1977), and also in *Austin Independent School District* v. *United States,* —— U. S. ——, 97 S. Ct. 517 (1976).

The concurring opinion of *Austin, supra,* probably contains the strongest language yet used by this Court in denying the necessity for eliminating all racially identifiable schools in a school system which once prac-

*In the absence of constitutional requirements or of other compelling factors of education or convenience unrelated to race, every child should be allowed (though not required) to attend the school nearest him. While admittedly this principle might leave some students in racially identifiable schools, so long as this homogeneity was not the result of state action taken to exclude students on the basis of their race or national origin, and especially where the students could themselves escape this result, such a state of affairs ought not to be considered an affront to the Constitution. See "In Uplifting, Get Underneath," by Nathan Glazer, published in *National Review* on October 15, 1976.

ticed segregation by law. In an opinion written by Justice Powell and concurred in by Justice Rehnquist and Chief Justice Burger, they severely criticized the effort of the lower court "to achieve a degree of racial balance in every school in Austin," *Austin, supra,* 97 S. Ct. at 518, and noted that such a remedy "appears to exceed that necessary to eliminate the effect of any official acts or omissions."

Commenting further on the limited nature of the violations found by the courts below and on the relationship of those violations to the remedy required, Justice Powell wrote:

> "The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was co-extensive with the constitutional violations, it adopted a view of constitutional obligations of a school board far exceeding anything required by this Court." *Austin, supra,* 97 S. Ct. at 519.

In further criticizing the lower court's opinion that earlier state segregative action now necessitated the elimination of all racially identifiable schools, Justice Powell stated:

> "I do not suggest that transportation of pupils is never a permissible means of implementing desegregation. I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may

> not properly exceed the effect of the constitutional violation. Thus, large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary-age children. A remedy simply is not equitable if it is disproportionate to the wrong." *Austin, supra,* 97 S. Ct. at 519.

Furthermore, in language reminiscent of the District Court's finding regarding Jefferson County, Justice Powell noted:

> "The principal cause of racial and ethnic imbalance in urban public schools across the country —North and South—is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns." *Austin, supra,* 97 S. Ct. at 519.

Under these circumstances, Justice Powell referred to the error made by the Court of Appeals for the Fifth Circuit. It was the same as that which has been made by the lower courts in the present instance:

> "Apparently misconceiving the import of the language in Green v. County School Board of New Kent County, 391 U. S. 430, 442 (1968), to the effect that there should be no 'Negro' school or

'white' school, the Court of Appeals seems to believe every school must be racially balanced to some degree. Green involved a rural, sparsely populated county with only two schools. Much of its language is irrelevant to a large urban school system. Moreover, the effect of applying the language of Green to such a system may be to stigmatize—without justification—schools that can be identified as having a racial or ethnic majority. The Solicitor General, speaking for the United States in this case, commented that 'there is nothing inherently inferior about all-black schools, any more than all-white schools are inferior, when the separation is not caused by state action.' Brief for the United States, at 8 n. 5." *Austin, supra,* 97 S. Ct. at 518, fn. 2.

These decisions by this Court are clearly in conflict with the opinion of the courts below that because some *de jure* segregation was found in Jefferson County the racial identifiability of every school must be eliminated. Since it was this conclusion alone which caused the rejection of the Coleman plan, this petition for writ of certiorari should be granted to this Petitioner.

II. In Light of the Widespread Failure of Existing Desegregation Plans, the Advantages of the Coleman Plan in the Administration by Federal Courts Over School Desegregation Are So Important as to Merit a Hearing by the District Court.

The decisions below raise recurring problems of great moment in the administration by federal courts over school desegregation. Because of their widespread

scope, these problems and their solution are of national significance and importance.

Newspapers and magazines* reveal that in city after city, desegregation orders requiring system-wide elimination of racially identifiable schools result in white flight, declining educational achievement levels, financial difficulty arising from reduced enrollment, disillusionment of parents, diminished teacher morale, and decreased public support.

More and more sociologists, educators, legal scholars, and academicians are questioning the merits of attempting to eliminate all racially identifiable schools through plans involving some necessary degree of racial balancing. In an article entitled *Defining and Attaining Equal Educational Opportunity in a Pluralistic Society,* 26 Vanderbilt Law Review, page 461 (1973), at page 478, Dean Ernest Campbell observes that "the busing issue has acquired meanings that seem to have little relevance for the education of children in any direct sense."

Furthermore, after a ten-year study of a large-scale busing program in Riverside, California, Norman Miller and Harold B. Gerard concluded in an article entitled "How Busing Failed in Riverside", published in *Psychology Today* (June, 1976), that busing, even

*See, for example, *Busing: Integrationists Now Have Their Doubts,* N. Y. Times, June 22, 1975, Section E, page 16, column 1; *Rescinding a California Busing Order,* N. Y. Times, June 22, 1975, Section E, page 6, column 2; *School Integration Drive Eases in the South,* N. Y. Times, June 29, 1975, page 1, column 4; *Busing—The Arrogance of Power,* by Michael Novak, Wall Street Journal, July 25, 1975; *Freedom and the Busing Quagmire,* by George F. Will, Newsweek, July 12, 1976, page 76; and *A Black "Conservative" Dissents,* by Thomas Sowell, Courier-Journal Sunday Magazine, September 5, 1976, reprinted from N. Y. Times.

where voluntary, shows no positive changes in the achievement, motivation or personality of the black children involved. Similar conclusions have also been reached by others who have studied this field. See, for example, *School Desegregation Outcomes for Children,* by Nancy St. John (New York, John Wiley, 1975); and *Longitudinal Study of School Desegregation,* by David J. Armor and Robert Crain, published by The Rand Corporation.*

Ironically, even as regards the removal of racially identifiable schools, in the long-run massive busing plans often appear to have a counterproductive result. For example, in his avowal testimony given in this case on May 4, 1976, Dr. O. Z. Stephens, Director of Research and Planning for the Memphis City School System in Memphis, Tennessee, stated that since busing was begun in Memphis the school system has lost 44,000 whites, the loss of at least 35,000 of which can be directly attributed to white flight motivated by the desegregation orders of the federal courts. The result of this activity has been to convert the entire school system into a predominantly black racially identifiable entity. (Stephens, O.Z., Transcript of Testimony, May 4, 1976, pages 53, 55, 61.) Furthermore, in their testimony on the same day, David J. Armor, a Rand Corporation sociologist formerly with Harvard University, and Dr.

*See also "The Evidence on Busing", by David J. Armor, *The Public Interest* (Summer 1973), and comments of Dr. James S. Coleman in "Busing: A Great Debate", published in *Southern Journal* (Spring 1976), page 9. Also see *Inequality: A Reassessment of the Effect of Family and Schooling in America,* Jencks (1972); *Recent Trends in School Education,* Coleman, Kelly & Moore (mimeo. 1975); and testimony of Dr. Coleman on May 4, 1976 contained on page 62 in the appendix below to the Court of Appeals.

James S. Coleman, a University of Chicago sociologist, also stated that desegregation plans requiring massive busing in metropolitan areas have often produced white flight resulting in racially identifiable schools. (Armor, David J., Transcript of Testimony, May 4, 1976, page 36; and Coleman, James S., Transcript of Testimony, May 4, 1976, contained in the appendix below to the Court of Appeals on page 66.)

Blacks also are increasingly questioning the value of desegregation plans requiring substantial busing. In an article entitled *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* Yale Law Review, Volume 85, No. 4, March, 1976, at page 471, Harvard Law Professor Derrick A. Bell, Jr., himself a black, suggested that in their continued efforts to achieve racial balance in public schools civil rights lawyers may no longer actually be serving the best interests of the black children they are presumed to represent.

A much more severe criticism of this effort has been made by Thomas Sowell, a black scholar working at the Center for Advanced Study in Behavorial Sciences at Stanford University. In an article first printed in the New York Times and later reprinted in the Courier-Journal Sunday Magazine on September 5, 1976, Dr. Sowell wrote:

> "The prevailing liberal orthodoxy insists that busing is essential for black children to receive their constitutional rights—and they are to have their rights if it kills them . . .
>
> "The really crucial assumption behind involuntary busing is that some tangible benefit will result

—presumably to black children, but one would hope, to white children as well, and to the cause of racial understanding and mutual respect. The hard evidence does not support these assumptions."

Judges* also have recognized the often deleterious consequences of judicial attempts to eliminate racially identifiable schools. Thus, in his opinion in *Keyes, supra* (partly concurring and partly dissenting), Mr. Justice Powell states:

> "The single most disruptive element in education today is the widespread use of compulsory transportation especially at elementary grade levels. (413 U. S. at 253)
>
> "No one can estimate the extent to which dismantling neighborhood education will hasten an exodus to private schools, leaving public school systems the preserve of the disadvantaged of both races. * * * Nor do we know to what degree this remedy may cause deterioration of community and parental support of public schools or divert attention from the paramount goal of quality in education to a perennially devisive debate over who is to be transported where." *Keyes, supra,* 413 U. S. at 250.

*Lower court judges also have severely criticized the doctrine which the lower courts have adopted in the instant case. For example, in a dissenting opinion in *Bronson* v. *Board of Education of the City School District of Cincinnati,* 525 F. 2d 344, 358 (6th Cir., 1975), Circuit Judge Weick stated:

> "In effect, what plaintiffs want is an 'equal but racially balanced' doctrine. * * * In my opinion, if such a doctrine ever became law, it would subject the people on a nationwide basis to taxation to pay for forced busing costing billions of dollars, which could be used more appropriately to improve the quality of education. It would polarize the races and irreparably harm all the good which has been accomplished in civil rights."

In removing *de jure* segregation from our schools, federal courts should not become unmindful of the public interest. Where two plans meet constitutional requirements, that which does not work should yield to that which does. As in other equity cases, in the framing of equitable remedies for school desegregation cases, the task is to balance the individual and collective interests involved. *Brown, supra,* 349 U. S. at 300.

Petitioner believes that there are many advantages to the Coleman plan which merit a hearing by the District Court. Moreover, assuming a determination in this case favorable to Petitioner, the District Court has indicated its willingness to hear the evidence regarding the Coleman alternative plan. For the reasons already suggested, therefore, the District Court should now be given that opportunity. The endeavor to seek the best possible solutions to the problems of school desegregation should be encouraged by this Court.

CONCLUSION

The issues raised herein call for adjudication by this Court for a number of fundamental reasons. To begin with, the decision of the courts below that the Constitution requires the removal of all racial identifiability (i.e., racial balancing) in every school in Jefferson County, regardless of the reasons for the initial imbalance, is patently inconsistent with the rulings of this Court. Furthermore, the possibilities raised by the Coleman plan itself are of nationwide importance and present a new and basic solution to the administration by the federal courts of the desegregation of the na-

tion's schools. As a consequence, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 1977, three copies of this Petition for Writ of Certiorari and attached Appendix were personally delivered to: Mr. Thomas L. Hogan, 701 W. Walnut Street, Louisville, Kentucky 40202; Mr. John A. Fulton, 1805 Kentucky Home Life Building, Louisville, Kentucky 40202; and to Mr. Henry A. Triplett, 231 South Fifth Street, Louisville, Kentucky 40202, said counsel representing the parties required to be served, and said service having conformed to the requirements of Rule 21(1) and Rule 33 of the Supreme Court Rules.

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 76-2205

NEWBURG AREA COUNCIL, INC., ET AL. - *Plaintiff-Appellee*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. - - - - - - *Defendant*

JOHN E. HAYCRAFT, ET AL. - - *Plaintiff-Appellee*

v.

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, ET AL. - - - - - - - - *Defendant*

I. J. HOLLENBACH, III - *Intervenor-Defendant-Appellant*

ORDER—Filed March 11, 1977

Before: PHILLIPS, Chief Judge, and PECK and ENGEL, Circuit Judges.

This matter has been submitted upon the motion of the appellees to dismiss this appeal under the provisions of Rule 8(b) and Rule 9, Rules of the Sixth Circuit, and upon the memoranda of counsel in support of and in opposition to said motion. In his memorandum in opposition to the motion, the intervenor-appellant states that he "agrees with this Court and the Supreme Court that the Constitution requires only the elimination of the vestiges of state imposed segregation," but he contends therein that "[t]he district court held that it must [eliminate the racial identifiability of *every* school in Jefferson County] as a conse-

quence of the mandate from this Court," whether or not the vestiges of segregation were state imposed. However, in the order from which this appeal was perfected, the district court specifically stated that our order "imposed on this Court [the duty] to eliminate all vestiges of *state-imposed segregation* in the Jefferson County Schools." (Emphasis supplied.) It thus clearly appearing that the District Court properly understood and applied the mandate of this court, it is manifest that the questions on which the decision of this court depends are so unsubstantial as not to need further argument (Rule 8(b), Rules of the Sixth Circuit), and accordingly,

IT IS ORDERED that the motion be and it hereby is granted, and it is further ORDERED that this appeal be and it hereby is dismissed.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN,
Clerk of Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NEWBURG AREA COUNCIL, INC., et al., - - *Plaintiffs*

v. **Civil Action No. 7045**

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al., - - - - - - *Defendants*

JOHN E. HAYCRAFT, et al., - - - - *Plaintiffs*

v. **Civil Action No. 7291**

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, et al., - - - - - - *Defendants*

MEMORANDUM OPINION AND ORDER—
Entered May 18, 1976

On May 4, 1976 testimony was heard concerning an alternative plan to the Court's desegregation order announced on July 30, 1975. The alternative plan was the product of the intervenor, L. J. Hollenbach, III, his staff and his experts. In brief the intervenor's plan centered on the current sociological beliefs of James S. Coleman, Professor of Sociology at the University of Chicago, the intervenor's lead witness.

After Professor Coleman had testified for some time the Court asked him whether he believed the proposed alternative plan would eliminate all remaining vestiges of state-imposed segregation in the Jefferson County school system. The witness answered it would not; yet, subsequently opined that no desegregation plan would eliminate racial identification in all schools in Jefferson County.

The Court is firmly convinced that such a concession by Professor Coleman requires the dismissal of the intervenor Hollenbach as a party to this lawsuit. Although the Court notes with interest that Professor Coleman does not believe that all remaining vestiges of state-imposed segregation can be eliminated from the Jefferson County school system, such an opinion, even from an expert, is not binding on this Court. Significantly, and it must be understood by all, this Court is under *a duty* to eliminate all remaining vestiges of state-imposed segregation in the Jefferson County schools. *Newburg Area Council, Inc.* v. *Board of Education*, 510 F. 2d 1358 (6th Cir. 1974). *See also Newburg Area Council, Inc.* v. *Gordon*, 521 F. 2d 578 (6th Cir. 1975). Neither Professor Coleman nor counsel for the intervenor Hollenbach fully understood that point.

Equal protection for all citizens is required by the Fourteenth Amendment to the United States Constitution. In the mainstream of human conduct such a task will be difficult, and maybe impossible, to achieve. However, the mere fact that the task is onerous does not mean we should abrogate our duty to strive toward that end. Similarly, the order imposed on this Court to eliminate all vestiges of state-imposed segregation in the Jefferson County schools is a very heavy one. However, it is a task which the Court believes can be accomplished if a determined and sustained effort is made. Alternative plans, such as the intervenor Hollenbach's, which are self-proclaimed failures, at least insofar as the Court's orders from the Sixth Circuit Court of Appeals are concerned, cannot be accepted as viable alternatives to the July 30, 1975 desegregation order.

WHEREFORE, FOR THE FOREGOING REASONS, it is hereby ORDERED that the intervenor Hollenbach shall be, and the same is hereby, dismissed as a litigant in this action,

And, there being no just reason for delay, the Clerk of the Court is directed to enter a final and appealable judg-

ment from this order dismissing the intervenor Hollenbach as a litigant in this action.

May 18, 1976

(s) JAMES F. GORDON
Senior United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NEWBURG AREA COUNCIL, INC., et al., - - *Plaintiffs*

v. **Civil Action No. 7045**

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al., - - - - - - *Defendants*

JOHN E. HAYCRAFT, et al., - - - - *Plaintiffs*

v. **Civil Action No. 7291**

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, et al., - - - - - - - - *Defendants*

JUDGMENT—Entered May 18, 1976

For all the reasons stated in the Memorandum Opinion of this day, the Court hereby making an express determination that there is no just reason for delay and the Court hereby making an express direction for the entry of this final judgment,

IT IS HEREBY ORDERED AND ADJUDGED that the intervenor L. J. Hollenbach, III, be, and he is hereby, dismissed as a litigant in this action.

May 18, 1976

(s) JAMES F. GORDON
Senior United States District Judge

Copies to:
Counsel of record

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1755

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - - Petitioner

versus

JOHN E. HAYCRAFT, et al. - - Respondents

versus

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - Respondents

(Other respondents named on inside cover)

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Additional Respondents in this case are Lyman Johnson, Richard Miller, Aaron Howard, John Schmidt, Earl Alluisi, John R. Hughes, Sarah White, Johnie Wright, Suzanne Post, Hazel K. Lane, American Federation of Teachers, Jefferson County Federation of Teachers, Local 672, and the Kentucky Human Relations Commission.

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1755

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - *Petitioner*

v.

JOHN E. HAYCRAFT, ET AL. - - *Respondents*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. - - - *Respondents*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

For the reasons set forth in the Petition for Writ of Certiorari previously filed herein and for the further reasons set forth in this Supplemental Brief, the Petitioner, L. J. Hollenbach, III, County Judge of Jefferson County, Kentucky, respectfully prays that a writ of certiorari issue to review the decision rendered in this case on March 11, 1977, by the United States Court of Appeals for the Sixth Circuit.

AUTHORITY FOR SUPPLEMENTAL BRIEF

The Petitioner has previously filed a Petition for Writ of Certiorari in this case. Relevant new decisions have since been handed down by this Court. Therefore, this Supplemental Brief is filed pursuant to Rule 24(5) of the Rules of the Supreme Court of the United States, which states:

> "Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

REASON FOR SUPPLEMENTAL BRIEF

This class action is a school desegregation case involving the public schools in Jefferson County, Kentucky. As the chief executive officer of that county, on December 22, 1975, Petitioner was allowed to intervene in this suit by the District Court for the purpose of filing an alternative desegregation plan.

Petitioner's plan was filed on April 22, 1976, and on May 4, 1976 a hearing was begun on that plan. During the course of the hearing, Petitioner's counsel argued that in a system with limited and narrow segregative actions it was not necessary to remove the racial identifiability of every school in Jefferson County. More specifically, Petitioner's counsel argued that it was not necessary to racially balance those schools which were racially identifiable only as a result of neighborhood makeup. The District Court rejected

this argument and held that because the Petitioner's plan failed to eliminate the racial identifiability of every school in Jefferson County that plan did not meet constitutional requirements as set forth by the Court of Appeals for the Sixth Circuit.* Consequently, on May 15, 1976, Petitioner was dismissed as a party to this action.

Petitioner appealed the decision of the District Court, but on March 11, 1977, the Court of Appeals for the Sixth Circuit dismissed the Petitioner's appeal and thus, in effect, affirmed the decision of the District Court.

On June 9, 1977, the Petitioner filed a Petition for Writ of Certiorari with respect to the Sixth Circuit's order of March 11, 1977. Since that time, however, this Court has issued three important decisions with a direct bearing on the case at hand, i.e., *Dayton* v. *Board of Education* v. *Brinkman,* —— U. S. ——, 45 L. W. 4910 (June 27, 1977), reversing the order of the Court of Appeals for the Sixth Circuit, and *Brennan* v. *Armstrong,* —— U. S. ——, 45 L.W. 3850 (June 28, 1977), and *School District of Omaha* v. *U. S.,* —— U. S. ——, 45 L.W. 3850 (June 28, 1977),** both of which cited the *Dayton* v. *Brinkman* opinion as their sole authority.

Because of their similarity to the issues presented in this Petition for Certiorari, and further because it was the same Sixth Circuit which erred in both *Dayton* v. *Brinkman, supra,* and here, these recent de-

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*For this discussion between Petitioner's counsel and the District Court see the Appendix attached hereto.

**All three opinions are contained in the Addendum hereto beginning on page 19.

cisions are important to this case. Therefore, this Supplemental Brief is directed to an analysis of the issues now before this Court in light of the above decisions.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The Lower Court's Conclusion That All Racially Imbalanced Schools Must Be Eliminated In Jefferson County Is Clearly Erroneous When Examined In the Light of *Dayton v. Brinkman*, Etc.

The circumstances of the instant case are strikingly similar to those found in *Dayton* v. *Brinkman, supra.* In both cases the Sixth Circuit has focused on the existence of racially imbalanced schools and optional attendance zones as clear vestiges of state-imposed segregation requiring corrective action by the federal courts.

Furthermore, in both cases the Sixth Circuit did not itself specify a remedy for these "violations," but left little doubt in the minds of the district courts that there would be no feasible way to comply with the orders of the Court of Appeals without a substantial amount of student transportation.*

*In the instant case, the Sixth Circuit particularly made this clear by its severe criticism of neighborhood school zoning where such zoning resulted in racially identifiable schools. Thus, the Sixth Circuit stated:

> "Geographic zoning assignment is not a permissible method for a school board to employ in dismantling the dual system and eliminating all vestiges of state-imposed segregation if it does not work. The measure of any plan is its effectiveness in accomplishing desegregation. [Cite omitted.] Because of the residual effects of past discrimination, the Louisville zoning assignment plan has not been effective despite the good intentions of the school board." *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 489 F. 2d 925, 931 (6th Cir. 1973).

Thus, in the present case, for example, despite the original finding of the District Court that the public schools in Jefferson County were not operated in an unconstitutional manner, the Sixth Circuit, in overruling that decision, stated as follows:

> "A large number of racially identifiable schools in a school district that formerly practiced segregation by law gives rise to a presumption that all vestiges of state-imposed segregation have not been eliminated." *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* 489 F. 2d 925, 930 (6th Cir. 1973).

Moreover, the Sixth Circuit reached this conclusion even though the District Court had specifically found that the racial makeup of these schools was due to neighborhood racial makeup.

As was true of *Dayton* v. *Brinkman, supra,* the Sixth Circuit did not reverse the findings of fact which had been made by the District Court, nor did it engage in its own fact-finding based on evidence adduced before the District Court. Nevertheless, the Sixth Circuit clearly indicated its own view of the law as requiring the elimination of racially identifiable schools in any system which has once (apparently no matter how long ago) practiced segregation by law. Thus, racially identifiable schools were made synonymous with vestiges of state-imposed segregation, and the Sixth Circuit ordered the District Court to eliminate all such vestiges.

As in *Dayton* v. *Brinkman, supra,* even though the Sixth Circuit did not itself actually specify a remedy, it did indicate that the remedial plan was to be system-

wide* and designed to eliminate racially identifiable schools. As was also true of *Dayton* v. *Brinkman, supra,* the District Court naturally concluded in the instant case that there was no feasible way to comply with the mandate of the Court of Appeals except by the imposition of racial quotas and the substantial cross-county busing of children.

It was also because of this view that the alternative plan of this Petitioner was rejected by the lower courts. Petitioner believes, however, that in *Dayton* v. *Brinkman, supra, Brennan* v. *Armstrong, supra* and *School District of Omaha* v. *U. S., supra,* this Court has once again made clear that the law does not require the elimination of all racially identifiable schools. Even in a system which has once practiced segregation by law, such schools are not necessarily a vestige of such state-imposed segregation, if, in fact, they were not caused by it. Thus, to require the balancing of all such schools in these circumstances is erroneous. For as this Court states in *Dayton* v. *Brinkman,* 45 L. W. at 4913, Addendum at 30-31.

> "Viewing the findings . . . in the strongest light for the respondents, the Court of Appeals

*Actually, in the *Newburg* decision, the Sixth Circuit suggested more than that the remedy be system-wide, it suggested that it be county-wide. Although this involved the crossing of school district boundaries, the Sixth Circuit relied on its own opinion handed down in *Bradley* v. *Milliken,* 484 F. 2d 215 (6th Cir. 1973), an opinion later reversed by this Court in *Milliken* v. *Bradley,* 418 U. S. 717 (1974), and found the crossing of school district lines perfectly permissible where necessary to eliminate racially identifiable schools. (See *Newburg, supra,* 489 F. 2d at 932.) This issue was later eliminated, however, when the Louisville and Jefferson County school systems merged under state law in 1975.

> simply had no warrant in our cases for imposing the systemwide remedy which it apparently did. There had been no showing that such a remedy was necessary to 'eliminate all vestiges of the state-imposed school segregation.' It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominately black. This fact without more, of course, does not offend the Constitution. [Cite omitted.] The Court of Appeals seems to have viewed the present structure of the Dayton school system as a sort of 'fruit of the poisonous tree' since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope."

The similarities between *Dayton* v. *Brinkman, supra,* and Jefferson County are: (1) racially imbalanced schools resulting mostly from demographic patterns; (2) optional attendance policies which the courts in both instances found had been applied fairly and without discrimination, and (3) inappropriate attendance zones which in both cases affected only three schools. As the Court explicitly held in *Dayton* v. *Brinkman, supra,* these violations did not justify imposition of a system-wide remedy even in a system which formerly had practiced segregation by law. The Court's conclusion might be expressed by the following equation: racially imbalanced schools, plus optional attendance

policies, plus a failure to redistrict certain attendance zones *does not equal* (i.e., does not require) system-wide busing. Moreover, in the case at bar, the finding that the pupil population in the various Jefferson County schools "is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board." *Dayton* v. *Brinkman,* 45 L. W. at 4912, Addendum at 27.

In summary, the situation in the instant case is virtually identical to the circumstances in *Dayton* v. *Brinkman, supra; Brennan* v. *Armstrong, supra;* and *School District of Omaha* v. *U. S., supra,* and its outcome should be the same.

II. Since the Lower Courts At No Time Have Determined How Much Incremental Segregative Effect Resulted From the Jefferson County School System's Limited Constitutional Violations, A Hearing On This Question Is Now Clearly Required In Light Of *Dayton v. Brinkman*, Etc.

When the Sixth Circuit reversed the District Court's decision that the Jefferson County schools were not unlawfully segregated, no attempt was made by either that court or the District Court upon remand to determine how much incremental segregative effect the violations had on the racial distribution of the Jefferson County schools. In its order of remand, the Court of Appeals only mandated that the District court was promptly to design and implement a systemwide

remedy which would eliminate racially identifiable schools.

In the argument of Petitioner's counsel to the District Court, the Petitioner attempted to point out that before holding that it was necessary to racially balance the entire school system of Jefferson County, the District Court should first have attempted to define the vestiges of state-imposed segregation, that is, to determine the effect of the unlawful state action on the school system's racial distribution. A portion of that discourse is as follows:

Mr. Talbott:

"The real nature of the suggestion which the Intervenor makes in this case is that the removal of racial identification in every school in Jefferson County goes far beyond the removal of the vestiges of state-imposed segregation. * * *

Your Honor, we feel that before a plan is implemented to create racial balance in the entire Jefferson County school system, to require certain racial quotas or percentages in every school in the school system, the Court ought at least to address itself to the question—and this would require appropriately, Your Honor: 'What exactly are the vestiges of state-imposed segregation in the Jefferson County School System?' "

The Court:

"Let me take square issue with that. I held that there were no vestiges of state-imposed segregation in Jefferson County. And the Sixth Circuit reversed, and emphatically held that there were state-imposed vestiges of segregation, period.

They didn't ask me to go back and see what they were." Appendix at 16-17.

The most recent opinions of this Court in *Dayton* v. *Brinkman, supra, Brennan* v. *Armstrong, supra,* and *School District of Omaha* v. *U. S., supra,* all make it abundantly clear that before imposing a plan which requires the elimination of all racially identifiable schools, the lower courts must first determine that such racial imbalance is the result of some unlawful state action. Thus, as was stated by this Court in identical language in both *Brennan* v. *Armstrong* and *School District of Omaha* v. *U. S.:*

> "Neither the District Court in ordering development of a remedial plan, nor the Court of Appeals in affirming, addressed itself to the inquiry mandated by our opinion in No. 76-539, *Dayton Board of Education* v. *Brinkman,* in which we said:
>
> 'If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.' Slip. op., at 13-14.
>
> The petition for certiorari is accordingly granted, and the judgment of the Court of Appeals is vacated and remanded for reconsideration . . ." *Brennan* v. *Armstrong, supra,* 45 L. W. at 3850, Addendum at 38-39; *School District of Omaha* v. *U. S.,* 45 L. W. at 3850, Addendum at 42.

It is interesting to note that the District Court implicitly anticipated the emergence of this standard in its original decision in 1973. In that decision the District Court specifically found that there was no incremental segregative impact resulting from school attendance policies. Indeed, the Court found that there was even greater integration in the schools than in the neighborhoods they served.

In the school desegregation cases relied upon herein, this Supreme Court has had to deal with the over-utilization by the circuit courts of appeals, and particularly by the Court of Appeals for the Sixth Circuit, of a presumption that racially identifiable schools are *per se* unconstitutional in a system which has formerly practiced segregation by law. *Dayton* v. *Brinkman* requires as a condition precedent to a system-wide remedy that a casual connection be demonstrated between impermissible state action on the one hand and racially identifiable schools on the other.

The system-wide racial balancing through quotas with its consequential massive busing imposed in the instant case ignores the question of whether or not impermissible state action caused to any degree the existence of racially identifiable schools in Jefferson County. Yet under the standards enunciated by this Court, this question must be examined. The Petitioner, therefore, and the other parties to this action, should now be given an opportunity at the district court level to develop the proof on whether or not the admitted racial identifiability of certain schools is in any way a result or increment of any impermissible state action.

Moreover, in the light of such an inquiry, these same parties should be allowed to present alternative desegregation plans designed specifically to remedy such incremental effects as may be demonstrated through such an inquiry.

CONCLUSION

For the reasons set forth in this Supplemental Brief and in the previously filed Petition for Writ of Certiorari, Petitioner respectfully submits that this Court should issue a writ of certiorari as herein requested and should remand this case for reconsideration in light of this Court's recent opinions in the school desegregation cases.

Respectfully submitted,

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Of Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 1977, three copies of this Supplemental Brief in Support of Petition for Writ of Certiorari were hand-delivered to: Mr. Thomas L. Hogan, 701 W. Walnut Street, Louisville, Kentucky 40202; Mr. John A. Fulton, 2510 First National Tower, Louisville, Kentucky 40202; and to Mr. Henry A. Triplett, 231 South Fifth Street, Louisville, Kentucky 40202, said counsel representing the parties required to be served and said service having conformed to the requirements of Rule 21(1) and Rule 33 of the Supreme Court Rules.

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Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7045/7291

NEWBURG AREA COUNCIL, INC., ET AL. - - *Plaintiffs*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, ET AL. - - - - - - - *Defendants*

L. J. HOLLENBACH, III - - - - *Intervenor*

TRANSCRIPT OF PROCEEDINGS OF MAY 4, 1976

The following Hearing, coming on to be heard before Honorable James F. Gordon, Senior Judge, United States District Court, Western District of Kentucky, at Louisville, Jefferson County, Kentucky, on May 4, 1976, at 9:30 A.M. The following colloquy is a portion of the discussion between District Court Judge James F. Gordon and Petitioner's counsel, Ben J. Talbott. This discussion was pursuant to a motion made by Respondents' counsel to dismiss Petitioner because of the admission of his witness, Professor James S. Coleman, that the Coleman alternative desegregation plan would not remove the racial identifiability of every school in Jefferson County. The discussion is contained in Vol. IV, pp. 99-103 of the Transcript and on pp. 109-112 of the Appendix below to the Court of Appeals for the Sixth Circuit.

• • • • • • •

Vol. IV, p. 99

The Court: Gentlemen, as I see, and I recognize the legitimacy of your arguments, Mr. Talbott, I recognize the sincerity of Judge Hollenbach's assertions, but I am just overwhelmed by the fact that the assertions he asks do not meet the requirements of me by the Sixth Circuit.

And if Judge Hollenbach can take this present ruling and go to the Sixth Circuit and reverse me, then the Sixth Circuit will be required, I think, to change what they heretofore told. If they want to change it, then that is up to them. I am not on that Court, and I will abide by however they change it.

But, until they do change it, in the simple-minded manner in which I read it, I am going to stand by what I think it says now. And I'm going to sustain the motion, and dismiss this intervening.

Mr. Talbott: Your Honor, can I make some response? I think that the language that Your Honor

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read indicated that the Sixth Circuit has ordered the removal of the vestiges of State imposed segregation from this system. And, Your Honor, the Intervenor in this case is in perfect agreement with that language and with that command to you, Your Honor.

The real nature of the suggestion which the Intervenor makes in this case is that the removal of racial identification in every school in Jefferson County goes far beyond the removal of the vestiges of State imposed segregation.

For example, Your Honor, in Male School, which would be in a zoned school situation, without the imposition of Your Honor's plan, all black, is all black today, even though as a part of a former invalid state system, it was part of an all white plan.

Your Honor, the fact that state law previously commanded that that school be all white, the Intervenor sees in no part playing any effect in today's racial balance and

creating that as an all black school. So, Your Honor, we think that there is a serious distinction between the question of "racial identification" which, in many cases, could be created for reasons that are purely de facto, and the "vestiges of State imposed segregation," and I think that it's in the difference in the reading of that language that the

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Intervenor takes a different position and attitude from that taken by the plaintiffs, and possibly from that taken by Your Honor.

But in the Keyes case, as Your Honor is well aware of, the Supreme Court mandated the case back, remanded the case back to the District Court for purposes of hearing exactly what the vestiges of State imposed segregation were in that case.

Your Honor, we feel that before a plan is implemented to create racial balance in the entire Jefferson County School System, to require the meeting of certain racial quotas or percentages in every school in the school system the Court ought at least to address itself to the question—and this would require appropriately, Your Honor: "What exactly are the vestiges of State imposed segregation in the Jefferson County School System?"

The Court: Let me take square issue with that. I held that there were no vestiges of State imposed segregation in Jefferson County. And the Sixth Circuit reversed, and emphatically held that there were State imposed vestiges of segregation, period.

They didn't ask me to go back and see what they were. They found them in the record of the hearing I had already conducted. So that

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is as closed an issue as the War of 1812.

Mr. Talbott: Your Honor, they found them, and I agree with the Sixth Circuit, that they existed, and they also

required Your Honor to remove them. I think that still leaves open the question of exactly what is the Sixth Circuit requiring to be removed in this case?

We do not feel that the racial identification of every school in Jefferson County is a vestige of a former invalid state system.

The Court: That's our difference of opinion right there. And if you can sell them on that, it will be fine with me. It will be fine with me if you can sell them on it. And you are in Court. I let you in. You go in and do your good level best.

Mr. Talbott: Your Honor, with respect to that matter, I want to reiterate what Mr. Miller has earlier said. The Intervenor and his Counsel in this case want to thank you, again, for having allowed us in the case. We appreciate it.

The Court: I'm sorry, but this has to be my position about it.

Mr. Talbott: Your Honor, I think you have clarified for us at this point what you feel to be the law of this case.

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The Court: You have got a very concise, clear record. Whether I'm right in my thoughts about it, or whether you are right in yours, I don't know. And you get to that clearly and squarely presented to them without being encumbered in any fashion.

• • • • • • •

ADDENDUM

UNITED STATES SUPREME COURT

No. 76-539

DAYTON BOARD OF EDUCATION et al., Petitioners, *v.* MARK BRINKMAN et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 27, 1977]

Syllabus

In this school desegregation case the District Court after an evidentiary hearing held that petitioner, Dayton, Ohio, School Board, had engaged in racial discrimination in the operation of the city's schools. On the basis of a "cumulative violation" of the Equal Protection Clause that the court found, which was composed of three elements, *viz.*, (1) substantial racial imbalance in student enrollment patterns throughout the school system; (2) the use of optional attendance zones allowing some white students to avoid attending predominantly black schools; and (3) the School Board's rescission in 1972 of resolutions passed by the previous Board that had acknowleged responsibility in the creation of segregative racial patterns and had called for various types of remedial measures, the District Court, following reversals by the Court of Appeals of more limited remedies, ultimately formulated and the Court of Appeals approved, a systemwide remedy. The plan required, beginning with the 1976-1977 school year, that the racial composition of each school in the district be brought within 15% of Dayton's 48%-52% black-white population ratio, to be accomplished by a variety of deseg-

regation techniques, including the "pairing" of schools, the redefinition of attendance zones, and a variety of centralized special programs and "magnet schools." *Held:*

1. Judged most favorably to respondent parents of black children, the District Court's findings of constitutional violations did not suffice to justify the systemwide remedy. The finding that pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment absent a showing that this condition resulted from intentionally segregative actions on the part of the Board. *Washington* v. *Davis,* 426 U. S. 229, 239. The court's finding as to the option attendance zones applies to three high schools, and assuming that under *Washington* standards a violation was involved, only high school districting was implicated. And the conclusion that the Board's rescission action constituted a constitutional violation is of dubious soundness. It was thus not demonstrated that the systemwide remedy, in effect imposed by the Court of Appeals, was necessary to "eliminate all vestiges of the state-imposed school segregation."

2. In view of the confusion at various stages in this case as to the applicable principles and appropriate relief, the case must be remanded to the District Court. The ambiguous phrase "cumulative violation" used by both courts below, does not overcome the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed. More specific findings must be made, and if necessary, the record must be supplemented. Conclusions as to violations must be made in light of this Court's opinions here and in *Washington* v. *Davis, supra,* and *Village of Arlington Heights* v. *Metroplitan Housing Development Corp.,* 429 U. S. 252, and a remedy must be fashioned in light of the rule laid down in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1,

and elaborated on in *Hills* v. *Gautreaux,* 425 U. S. 284. In a case like this, where mandatory racial segregation has long since ceased, it must first be determined if the school board intended to, and did in fact, discriminate, and all appropriate additional evidence should be adduced; and only if systemwide discrimination is shown may there be a systemwide remedy. Meanwhile, the present plan should remain in effect for the coming school year subject to further District Court orders as additional evidence might warrant.

539 F. 2d 1084, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion. BRENNAN, J., filed an opinion concurring in the judgment. MARSHALL, J., took no part in the consideration or decision of this case.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This school desegregation action comes to us after five years and two round trips through the lower federal courts.[1] Those protracted proceedings have been devoted to the for-

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[1]This action was filed on April 17, 1972, by parents of black children attending schools operated by the defendant Dayton Board of Education. After an expedited hearing between November 13 and December 1, 1972, the District Court for the Southern District of Ohio, on February 1, 1973, rendered findings of fact and conclusions of law directing the formulation of a desegregation plan. App., at 1. On July 13, 1973, that court approved, with certain modifications, a plan proposed by the School Board. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed the findings of fact but reversed and remanded as to the proposed remedial plan. *Brinkman* v. *Gilligan,* 503 F. 2d 684 (CA 6 1974).

The District Court then ordered the submission of new plans by the Board and by any other interested parties. App., at 70. On March 10, 1975, it rejected a plan proposed by the plaintiffs, and, with some modifications, approved the Board's plan as modi-

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mulation of a remedy for actions of the Dayton Board of Education found to be in violation of the Equal Protection Clause of the Fourteenth Amendment. In the decision now under review, the Court of Appeals for the Sixth Circuit finally approved a plan involving districtwide racial distribution requirements, after rejecting two previous, less sweeping orders by the District Court. The plan required, beginning with the 1976-1977 school year, that the racial distribution of each school in the district be brought within 15% of the 48%-52% black-white population ratio of Dayton.[2] As finally formulated, the plan employed a variety of desegregation techniques, including the "pairing"[3] of

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fied and expanded in an effort to comply with the Court of Appeals mandate. App., at 73. On appeal, the Court of Appeals again reversed as to remedy and directed that the District Court adopt a system-wide plan for the 1976-1977 school year. . . ." *Brinkman* v. *Gilligan*, 518 F. 2d 853 (CA 6 1975).

Upon this second remand, the District Court, on December 29, 1975, ordered formulation of the plan whose terms are developed below. App., at 99. On March 25, 1976, the details of the plan were approved by the District Court. App., at 110. In the decision now under review, the Court of Appeals affirmed. *Brinkman* v. *Gilligan*, 539 F. 2d 1084 (CA 6 1976).

[2]The District Court said that it would deal on a case-by-case basis with failures to bring individual schools into compliance with this requirement. It also ordered that students already enrolled in the tenth and eleventh grades be allowed to finish in their present high schools, and announced the following "guidelines" to be followed "whenever possible" in the case of elementary school students.

"1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;

"2. Students should be transported to the nearest available school;

"3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter." App., at 104.

[3]"Pairing" is the designation of two or more schools with contrasting racial composition for an exchange program where a large portion of the students in each school attend the paired school for some period. In the plan adopted by the District Court, it was the primary remedy used in the case of elementary schools.

schools, the redefinition of attendance zones, and a variety of centralized special programs and "magnet schools." We granted certiorari, ____ U. S. ____ (Jan. 17, 1976), to consider the propriety of this court-ordered remedy in light of the constitutional violations which were found by the courts below.

Whatever public notice this case has received as it wended its way from the United States District Court for the Southern District of Ohio to this Court has been due to the fact that it represented an effort by minority plaintiffs to obtain relief from alleged unconstitutional segregation of the Dayton public schools said to have resulted from actions by the respondent School Board. While we would by no means discount the importance of this aspect of the case, we think that the case is every bit as important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system.

Indeed, the importance of the judicial administration aspects of the case are heightened by the presence of the substantive issues on which it turns. The proper observance of the division of functions between the federal trial courts and the federal appellate courts is important in every case. It is especially important in a case such as this where the District Court for the Southern District of Ohio was not simply asked to render judgment in accordance with the law of Ohio in favor of one private party against another; it was asked by the plaintiffs, students in the public school system of a large city, to restructure the administration of that system.

There is no doubt that federal courts have authority to grant appropriate relief of this sort when constitutional violations on the part of school officials are proven. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973); *Wright* v. *Council of City of Emporia*, 407 U. S.

451 (1972); *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U. S. 1 (1971). But our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley*, 418 U. S. 717, 741-742 (1974); *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 50 (1973); *Wright* v. *Council of City of Emporia*, *supra*, at 469. It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. Cf. *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976).

The lawsuit was begun in April 1972, and the District Court filed its original decision on February 7, 1973. The District Court first surveyed the past conduct of affairs by the Dayton School Board, and found "isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system."[4] It cited instances of physical segregation in the schools during the early decades of this century,[5] but concluded that "[b]oth by reason of the substantial time that had elapsed and because these practices have ceased, . . . the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy."

The District Court also found that as recently as the 1950s, faculty hiring had not been on a racially neutral basis, but that "by 1963, under a policy designated as one of

[4]The court pointed out that since 1888, Ohio law as construed by its Supreme Court has forbidden separate public schools for black and white children. See Ohio Rev. Code § 3313.48; *Board of Education* v. *State*, 45 Ohio St. 555 (1888).

[5]"'Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in the 1930's and 1940's and the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference.'' App., at 2-3 (footnote omitted).

'dynamic gradualism,' at least one black teacher had been assigned to all eleven high schools and to 35 of the 66 schools in the entire system." It further found that by 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member. The Court's conclusion with respect to faculty hiring was that pursuant to a 1971 agreement with the Department of HEW, "the teaching staff of the Dayton public schools became and still remains substantially integrated."[6]

The District Court noted that Dunbar High School had been established in 1933 as a black high school, taught by black teachers and attended by black pupils. At the time of its creation there were no attendance zones in Dayton and students were permitted liberal transfers, so that attendance at Dunbar was voluntary. The court found that Dunbar continued to exist as a citywide all-black high school until it closed in 1962.

Turning to more recent operations of the Dayton public schools, the District Court found that the "great majority" of the 66 schools were imbalanced and that, with one exception,[7] the Dayton School Board had made no affirmative effort to achieve racial balance within those schools. But the court stated that there was no evidence of racial discrimination in the establishment or alteration of attendance boundaries or in the site selection and construction of new schools and school additions. It considered the use of optional attendance zones[8] within the District, and concluded

[6]The court also considered employment of nonteaching personnel, and observed that blacks made up a proportion of the nonteaching, nonadministrative personnel equal to the proportion of black students in the District, though in certain occupations they were represented at a substantially lower rate.

[7]The court noted that a concerted effort had been made in the past few years to enroll more black students at the Patterson Co-op High School.

[8]An optional zone is an area between two attendance zones, the student residents of which are free to choose which of the two schools they wish to attend.

that in the majority of cases the "optional zones had no racial significance at the time of their creation." It made a somewhat ambiguous finding as to the effect of some of the zones in the past,[9] and concluded that although none of the elementary optional school attendance zones today "have any significant potential effects in terms of increased racial separation," the same cannot be said of the high school optional zones. Two zones in particular, "those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past."[10]

The court found no evidence that the District's "freedom of enrollment" policy had "been unfairly operated or that black students [had] been denied transfers because of their race." Finally the court considered action by a newly elected Board on January 3, 1972, rescinding resolutions, passed by the previous Board, which had acknowledged a role played by the Board in the creation of segregative racial patterns and had called for various types of remedial measures. The District Court's ultimate conclusion was that the "racially imbalanced schools, optional attendance zones, and the recent Board action . . . are cumulatively a violation of the Equal Protection Clause."

The District Court's use of the phrase "cumulative violation" is unfortunately not free from ambiguity. Treated most favorably to the respondents, it may be said to represent the District Court's opinion that there were three sep-

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[9]The District Court found that three high school optional zones "may have" had racial significance at the time of their creation.

[10]The following information about those zones is contained in an appendix to the District Court opinion:

High Schools	Date of Creation	% black population At date of creation	1972-73
Roosevelt/	1951	31.5	100.0
Colonel White	(extended 1958)	0.0	54.6
Kiser/	1962	2.7	9.8
Colonel White		1.1	54.6

arate although relatively isolated instances of unconstitutional action on the part of petitioners. Treated most favorably to the petitioners, however, they must be viewed in quite a different light. The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board. *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). The District Court's finding as to the effect of the optional attendance zones for the three Dayton high schools, assuming that it was a violation under the standards of *Washington* v. *Davis, supra*, appears to be so only with respect to high school districting. *Swann, supra*, at 15. The District Court's conclusion that the Board's recision of previously adopted school board resolutions was itself a constitutional violation is also of questionable validity.

The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman* v. *Mulkey*, 387 U. S. 369 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. We agree with the Court of Appeals' treatment of this action, wherein that court said:

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. *Hunter* v. *Erickson*, 393 U. S. 385 (1960); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty,

then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution." 503 F. 2d 684, 697.

Judged most favorably to the petitioners, then, the District Court's findings of constitutional violations did not, under our cases, suffice to justify the remedy imposed. Nor is light cast upon the District Court's finding by its repeated use of the phrase "cumulative violation." We realize, of course, that the task of factfinding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multimembered public bodies are of necessity difficult, cf. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 L. W. 4073 (Jan. 11, 1973), and the question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.

We think it accurate to say that the District Court's formulation of a remedy on the basis of the three part "cumulative violation" was certainly not based on an unduly cautious understanding of its authority in such a situation. The remedy which it originally propounded in light of these findings of fact included requirements that optional attendance zones be eliminated, and that faculty assignment practices and hiring policies with respect to classified personnel be tailored to achieve representative racial distribution in all schools.[11] The one portion of the remedial

[11]The District Court's first plan also contained the following provisions:

(V) Establishment of four city-wide elementary science centers the enrollment of which would approximate the existing black-white ratio of students in the system;

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plan submitted by the School Board which the District Court refused to accept without change was that which dealt with so-called "freedom of enrollment priorities." The court ordered that, as applied to high schools, new students at each school be chosen at random from those wishing to attend.[12] The Board was required to furnish transportation for all students who chose to attend a high school outside the attendance area of their residence.

Both the plaintiffs and the defendant School Board appealed the order of the District Court to the United States Court of Appeals for the Sixth Circuit. 503 F. 2d 684. That court considered at somewhat greater length than had the District Court both the historical instances of alleged racial discrimination by the Dayton School Board and the circumstances surrounding the adoption of the Board's resolutions and the subsequent recission of those resolutions. This consideration was in a purely descriptive vein: no findings of fact made by the District Court were reversed as having been clearly erroneous, and the Court of Appeals engaged in no factfinding of its own based on evidence adduced before the District Court. The Court of Appeals then focused on the District Court's finding of a three-part "cumulative" constitutional violation consisting of racially imbalanced schools, optional attendance zones, and the recision of the

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(VI) Combination of two high schools into a unified cooperative school with district-wide attendance areas;

(VII) Formation of elementary and high school all-city bands, orchestras and choruses;

(VIII) Provisions for scheduling of integrated athletics;

(IX) Establishment of a minority language program for education of staff;

(X) Utilization of the Living Arts Center for inter-racial experiences in art, creative writing, dance and drama;

(XI) Creation of centers for rumor control, school guidance and area learning. See App., at 35-36.

[12]The court thus eliminated a provision within the Board plan which gave first priority to students residing within the school's attendance zone.

Board resolutions. It found these to be "amply supported by the evidence."

Plaintiffs in the District Court, respondents here, had cross-appealed from the order of the District Court, contending that the District Court had erred in failing to make further findings tending to show segregative actions on the part of the Dayton School Board, but the Court of Appeals found it unnecessary to pass on these contentions. The Court of Appeals also stated that it was unnecessary to "pass on the question of whether the rescission [of the Board resolutions] by itself was a violation of" constitutional rights. It did discuss at length what it described as "serious questions" as to whether Board conduct relating to staff assignment, school construction, grade structure and reorganization, and transfers and transportation, should have been included within the "cumulative violation" found by the District Court. But it did no more than discuss these questions; it neither upset the factual findings of the District Court nor did it reverse the District Court's conclusions of law.

Thus the Court of Appeals, over and above its historical discussion of the Dayton school situation, dealt with and upheld only the three-part "cumulative violation" found by the District Court. But it nonetheless reversed the District Court's approval of the school board plan as modified by the District Court, because the Court of Appeals concluded that "the remedy ordered . . . is inadequate, considering the scope of the cumulative violations." While it did not discuss the specifics of any plan to be adopted on remand, it repeated the admonition that the court's duty is to eliminate "all vestiges of state-imposed school segregation." *Keyes, supra,* at 202; *Swann, supra,* at 15.

Viewing the findings of the District Court as to the three-part "cumulative violation" in the strongest light for the respondents, the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy

which it apparently did. There had been no showing that such a remedy was necessary to "eliminate all vestiges of the state-imposed school segregation." It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution. *Spencer* v. *Kugler,* 404 U. S. 1027 (1972); *Swann, supra,* at 24. The Court of Appeals seems to have viewed the present structure of the Dayton school system as a sort of "fruit of the poisonous tree," since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.

On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the District Court are clearly erroneous, it may reverse them under Fed. Rules Civ. Proc. 52(b). If it decides that the District Court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Here, however, as we conceive the situation, the Court of Appeals did neither. It was vaguely dissatisfied with the limited character of the remedy which the District Court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the District Court's findings of fact or reversing its conclusions of law.

The Court of Appeals did not actually specify a remedy, but did, in increasingly strong language in subsequent opinions require that any plan eliminate systemwide patterns of one-race schools predominant in the district. 518

F. 2d 853, 855. In the face of this commandment, the District Court, after twice being reversed, observed:

> "This court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. Based upon the plans of both the plaintiff and defendant the assumption must be that the transportation of approximately 15,000 students on a regular and permanent basis will be required."

We think that the District Court would have been insensitive indeed to the nuances of the repeated reversals of its orders by the Court of Appeals had it not reached this conclusion. In effect, the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the District Court, taking those findings of violations in the light most favorable to respondents.

This is not to say that the last word has been spoken as to the correctness of the District Court's findings as to unconstitutionally segregative actions on the part of the petitioners. As we have noted, respondents appealed from the initial decision and order of the District Court, asserting that additional violations should have been found by that court. The Court of Appeals found it unnecessary to pass upon the respondents' contentions in its first decision, and respondents have not cross-petitioned for certiorari from decision of the Court of Appeals in this Court. Nonetheless, they are entitled under our precedents to urge any grounds which would lend support to the judgment below, and we think that their contentions of unconstitutionally segregative actions, in addition to those found as fact by the District Court, fall into this category. In view of the con-

fusion at various stages in this case, evident from the opinions both of the Court of Appeals and the District Court, as to the applicable principles and appropriate relief, the case must be remanded to the District Court for the making of more specific findings and, if necessary, the taking of additional evidence.

If the only deficiency in the record before us were the failure of the Court of Appeals to pass on respondents' assignments of error respecting the initial rulings of the District Court, it would be appropriate to remand the case to that court. But we think it evident that supplementation of the record will be necessary. Apart from what has been said above with respect to the use of the ambiguous phrase "cumulative violation" by both courts, the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed requires supplementation of the record and additional findings addressed specifically to the scope of the remedy. It is clear that the presently mandated remedy cannot stand upon the basis of the violations found by the District Court.

The District Court, in the first instance, subject to review by the Court of Appeals, must make new findings and conclusions as to violations in the light of this opinion, *Washington* v. *Davis, supra,* and *Village of Arlington Heights, supra.* It must then fashion a remedy in the light of the rule laid down in *Swann, supra,* and elaborated upon in *Hills* v. *Gautreaux,* 425 U. S. 284 (1976). The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary. It 'may be exercised only on the basis of a constitutional violation.' [*Milliken* v. *Bradley*], 418 U. S., at 738, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16. See *Rizzo* v. *Goode,* 423 U. S. 362, 377. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation.' 418 U. S., at 744; *Swann, supra,* at 16." *Hills, supra,* at

294. See also *Austin Independent School Dist.* v. *United States*, ____ U. S. ____ (1976) (MR. JUSTICE POWELL, concurring).

The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington* v. *Davis, supra.* All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes, supra,* at 213.

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as "cumulative violation" than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

While we have found that the plan implicitly if not explicitly, imposed by the Court of Appeals was erroneous on the present state of the record, it is undisputed that it has been in effect in the Dayton system during the present year without creating serious problems. While a school board and a school constituency which attempt to comply with a plan to the best of their ability should not be penalized, we

think that the plan finally adopted by the District Court should remain in effect for the coming school year subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion.

The judgment of the Court of Appeals is vacated, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court today reaffirms the authority of the federal courts "to grant appropriate relief of this sort [i. e., busing] when constitutional violations on the part of school officials are proven. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973) . . . ." *Ante,* at 3. In this case, however, the violations actually found by the District Court were not sufficient to justify the remedy imposed. Indeed, none of the parties contends otherwise. Respondents nowhere argue that the three "cumulative violations" should by themselves be sufficient to support the comprehensive, systemwide busing order imposed. Instead, they urge us to find that other, additional actions by the school board appearing in the record should be used to support the result. The United States, as *amicus curiae,* concedes that the "three-part 'cumulative' violation found by the district court does not support its remedial order," Brief at 21, and also urges us to affirm the busing order by resort to other, additional evidence in the record. Under this circumstance, I agree with the result reached by the Court. I do so because it is clear from the holding in this case, and that in *Milliken* v. *Bradley*, ____ U. S. ____, ____ (1977), also decided today, that the "broad and flexible equity powers" of district courts to remedy unlawful school segregation continue unimpaired.

This case thus does not turn upon any doubt of power in the federal courts to remedy state-imposed segregation. Rather, as the Court points out, it turns upon the "proper allocation of functions between the district courts and the courts of appeals within the federal judicial system." *Ante,* at 3. As the Court recognizes, the task of the district courts and courts of appeals is a particularly difficult one in school desegregation cases, *ante,* at 14. Although the efforts of both the District Court and the Court of Appeals in this protracted litigation deserve our commendation, it is plain that the proceedings in the two courts resulted in a remedy going beyond the violations so far found.

On remand, the task of the District Court, subject to review by the Court of Appeals, will be to make further findings of fact from evidence already in the record, and, if appropriate, as supplemented by additional evidence. The additional facts, combined with those upon which the violations already found are based, must then be evaluated to determine what relief is appropriate to remedy the resulting unconstitutional segregation. In making this determination, the courts of course "need not, and cannot, close their eyes to inequities, shown by the record, which flow from a long-standing segregated system." *Milliken* v. *Bradley, supra,* at ____.

Although the three violations already found are not of themselves sufficient to support the broad remedial order entered below, this is not to say that the three violations are insignificant. While they are not sufficient to justify the remedy imposed when considered solely as unconstitutional *actions,* they clearly are very significant as indicia of *intent* on the part of the school board. As we emphasized in *Keyes, supra,* at 207. "Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system." Once segregative intent is found, the District Court may

more readily conclude that not only blatant, but also subtle actions—and in some circumstances even inaction—justify a finding of unconstitutional segregation that must be redressed by a remedial busing order such as that imposed in this case.

If it is determined on remand that the school board's unconstitutional actions had a "systemwide impact," then the court should order a "systemwide remedy." *Ante,* at 14. Under *Keyes,* once a school board's actions have created a segregated dual school system, then the school board "has the affirmative duty to desegregate the entire system 'root and branch.' " 413 U. S., at 213. Or, as stated by the Court today in *Milliken,* the school board must "take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.' " *Supra,* at ____ quoting *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U. S. 1, 15 (1971). A judicial decree to accomplish this result must be formulated with great sensitivity to the practicalities of the situation, without ever losing sight of the paramount importance of the constitutional rights being enforced. The District Court must be mindful not only of its "authority to grant appropriate relief," *ante,* at 3, but also of its duty to remedy fully those constitutional violations it finds. It should be flexible but unflinching in its use of its equitable powers, always conscious that it is the rights of individual school children that are at stake, and that it is the constitutional right to equal treatment for all races that is being protected.

MR. JUSTICE STEVENS, concurring.

With the caveat that the relevant finding of intent in a case of this kind necessarily depends primarily on objective evidence concerning the effect of the Board's action, rather than the subjective motivation of one or more members of the Board, see *Washington* v. *Davis,* 426 U. S. 229, 253-254 (STEVENS, J., concurring), I join the Court's opinion.

UNITED STATES SUPREME COURT

No. 76-809

BRENNAN v. ARMSTRONG

Per Curiam.

This school desegregation case involves the school system in the city of Milwaukee, Wis. The District Court here made various findings of segregative acts on the part of petitioner School Board members, appointed a Special Master "to develop a plan for the desegregation of the Milwaukee Public School system," and certified its order for interlocutory appeal to the Court of Appeals for the Seventh Circuit. The Court of Appeals, observing that there was "an unexplained hiatus between specific findings of fact and conclusory findings of segregated intent," stated that the District Court is "entitled to a presumption on consistency" and concluded that the findings of the District Court were not clearly erroneous. Neither the District Court in ordering development of a remedial plan, nor the Court of Appeals in affirming, addressed itself to the inquiry mandated by our opinion in No. 76-539, Dayton Board of Education v. Brinkman, in which we said:

"If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy." Slip op., at 13-14.

The petition for certiorari is accordingly granted, and the judgment of the Court of Appeals is vacated and remanded for reconsideration in the light of Village of Arlington Heights v. Metropolitan Development Corp., ____ U. S. ____ (1977), and Dayton.

Mr. Justice Stevens, with whom Mr. Justice Brennan and Mr. Justice Marshall join, dissenting.

My concern over the Court's misuse of summary dispositions prompts this dissent.

The Court's explanation of its action gives the erroneous impression that the Court of Appeals' decision related to the question of what kind of remedy is appropriate in this case. Quite the contrary, there was no remedy issue before the Court of Appeals, and that court considered no such issue.

The District Court concluded in a 60-page opinion that "school authorities engaged in practices with the intent and for the purpose of maintaining a segregated school system, and that such practices had the effect of causing current conditions of segregation in the Milwaukee public schools." Amos v. Board of Directors, 408 F. Supp. 765, 818 (ED Wis., 1976). Recognizing that "remedial efforts may well be for naught if the determination of liability is ultimately reversed on appeal," id., at 824, Judge Reynolds certified this issue of law for interlocutory appeal. To further ensure appealability, he entered a general order enjoining future racial discrimination and directing the defendants to formulate desegregation plans. App. 140-141. This order did not call for any particular kind of desegregation plan. Thus, when the case reached the Court of Appeals, the only issue before it was the existence of a violation.[1] After a careful review of the evidence, it concluded that the District Court's finding of intentional segregation was not clearly erroneous. Armstrong v. Brennan, 539 F. 2d 625 (CA7 1976).

This Court now vacates the Court of Appeals judgment and remands for reconsideration in light of two cases. One

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[1]After the case was argued in the Court of Appeals on June 2, 1976 (see 539 F. 2d 625), the District Court entered a broader remedy. App. 1142, 1144.

of those cases[2] is merely a routine application of Washington v. Davis, 426 U. S. 229, which was correctly construed by the Court of Appeals.[3] The other case is relevant to the issue of liability, if at all, only because it supports the Court of Appeals.[4]

Of course, in formulating a remedy, the District Court will need to consider cases such as Milliken v. Bradley, No. 76-447, and Dayton Board of Education v. Brinkman, No. 76-539, if there is any dispute about the proper scope of the remedy. But since no such issue has been decided by the Court of Appeals, there is nothing for it to reconsider in light of these cases. These cases certainly provide no justification for vacating the judgment affirming the District Court's conclusion that the defendants have violated the Constitution. This Court's hasty action will unfortunately lead to unnecessary work by already overburdened circuit judges, who have given this case far more study than this Court had time to give it. Nevertheless, it is quite clear that after respectful reconsideration the Court of Appeals remains free to re-enter its original judgment.

In my opinion the petition for certiorari should be denied. However, since the Court has granted the petition, and since it is not our practice to review findings of fact which the Court of Appeals has already determined to be supported by the record, I would affirm the judgment.

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[2]Village of Arlington Heights v. Metropolitan Development Corp., No. 75-616.

[3]The Court of Appeals cited Washington v. Davis as holding that "a 'racially discriminatory purpose' is essential to an equal protection violation in school cases, as in other cases," and that "purpose may be inferred from 'the totality of the relevant facts,' which may include discriminatory impact," 539 F. 2d, at 633-634; quoting Washington v. Davis, supra, at 242.

[4]Dayton is primarily a remedy case and therefore irrelevant to the action of the Court of Appeals in this case. It does, however, stress the limitations on appellate review in this area, such as the "clearly erroneous" rule, Slip op., at 11, which the Court of Appeals scrupulously followed, e.g., 539 F. 2d, at 637.

UNITED STATES SUPREME COURT

No. 76-705

SCHOOL DISTRICT OF OMAHA v. U. S.

Per Curiam.

This school desegregation case involves the School District of Omaha, Nebraska. The District Court in a comprehensive opinion extensively reviewed the evidence presented by the parties, and recognized that there was considerable racial imbalance in school attendance patterns. Applying a legal standard which placed the burden of proving intentional segregative actions on the respondent, and which regarded the natural and foreseeable consequences of petitioner's conduct as "neither determinative nor immaterial" out as "one additional factor to be weighed," the District Court concluded that the respondent had not carried the burden of proving a deliberate policy of racial segregation. On appeal, the Court of Appeals rejected the legal standard applied by the District Court, stating that a "presumption of segregative intent" arises from actions or omissions whose natural and foreseeable result is to "bring about or maintain segregation." Reviewing the facts found by the District Court concerning faculty assignment, student transfers, optional attendance zones, school construction, and the deterioration of one high school in the district, the Court of Appeals generally accepted these factual findings. In each instance, however, it concluded that there was sufficient evidence under the legal standard it adopted to shift the burden of proof to the petitioner. Finding that in no instance had the school carried its rebuttal burden, the Court of Appeals remanded for the formulation of a systemwide remedy. We denied certiorari. 423 U. S. 946.

Following the explicit instruction of the Court of Appeals, th District Court promulgated an extensive plan involving among other elements, the systemwide trans-

portation of pupils. On petitioner's appeal, the Court of Appeals for the Eighth Circuit affirmed.

In Washington v. Davis, 426 U. S. 229, 239 (1976), we said:

> "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."

We restated and amplified the implications of this holding in Village of Arlington Heights v. Metropolitan Housing Development Corp., ____ U. S. ____ (1977).

Neither the Court of Appeals nor the District Court, in addressing themselves to the remedial plan mandated by the earlier decision of the Court of Appeals, addressed itself to the inquiry required by our opinion in No. 76-539, Dayton Board of Education v. Brinkman, in which we said:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy." Slip op., at 13-14.

The petition for certiorari is accordingly granted, and the judgment of the Court of Appeals is vacated and remanded for reconsideration in the light of Village of Arlington Heights, and Dayton, supra.

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.

The Court's remand of this case for reconsideration in light of Village of Arlington Heights v. Metropolitan Housing Development Corp., ____ U. S. ____ (1977), and Dayton Board of Education v. Brinkman, ____ U. S. ____ (1977), is inappropriate because wholly unnecessary. The Court of Appeals concluded that "segregation in the Omaha School District was intentionally created and maintained by the defendants." 521 F. 2d 530, 532-533 (1975). The defendants did not contest in the Court of Appeals the finding of the District Court that the Omaha public schools are segregated. Ibid. The Court of Appeals carefully reviewed the abundant evidence in the record bearing on segregative intent and concluded that the evidence justified a presumption that segregative intent permeated defendants' policies concerning faculty assignment, student transfers, optional attendance zones, school construction, and the deterioration of 96% black Tech High School. Id., at 537-546. Relying on Keyes v. School District No. 1, Denver, Colorado, 413 U. S. 189, 210 (1973), the Court of Appeals further found that the defendants did not rebut this presumption because they "failed to carry *their burden of establishing that segregative intent was not among the factors which motivated their actions.*" Id., at 536, 537 (emphasis supplied). We denied certiorari. 423 U. S. 946 (1975). When the case came before the Court of Appeals for the second time a year later, the court explicitly reviewed its prior holding in light of our intervening decision in Washington v. Davis, 426 U. S. 229 (1976), and found nothing in that case to cause it to revise its earlier opinion. 541 F. 2d 708, 709 (1976).

Arlington Heights, supra, did not make new law, but only applied the holding of Washington v. Davis that discrimination must be purposeful to be unconstitutional. Arlington Heights interpreted Washington v. Davis to mean

that an action in which an "invidious discriminatory purpose was a motivating factor" is unconstitutional, and that proof that a decision is "motivated in part by a racially discriminatory purpose" shifts the burden of proof to the alleged discriminator. ____ U. S., at ____, ____, n. 21. The conclusion of the Court of Appeals that the defendants "failed to carry their burden of proof that segregative intent was not among the factors which motivated their actions" was based on language from our decision in Keyes, supra, but it so faithfully applies the Arlington Heights formulation that it reads as if the Court of Appeals had anticipated precisely what Arlington Heights would hold five months later. I cannot imagine that the Court of Appeals will do, or properly can do, anything on remand except reaffirm its judgment with a recitation of its gratification that Arlington Heights had been correctly anticipated.

Dayton, supra, reaffirmed the already well-established principle that the scope of the remedy must be commensurate with the scope of the constitutional violation. ____ U. S., at ____. In this case, the District Court ordered a comprehensive decree to remedy the effects of past discrimination, and the Court of Appeals affirmed. As is evident from a reading of the first Court of Appeals opinion describing the massive system-wide intentional segregation in the Omaha School District, a comprehensive order is entirely appropriate. A less comprehensive order would simply not remedy fully the unconstitutional conditions that have been found to exist in the school system. I would affirm the judgment of the Court of Appeals.

Mr. Justice Stevens, dissenting.

For the reasons stated by Mr. Justice Brennan, I cannot join the Court's summary disposition of this case. I would deny certiorari.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

No. 76-1755

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - - Petitioner

versus

JOHN E. HAYCRAFT, Et Al. - - Respondents

versus

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, Et Al. - Respondents

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BRIEF FOR RESPONDENTS HAYCRAFT, ET AL. IN OPPOSITION

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v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, Et Al. - *Respondents*

BRIEF FOR RESPONDENTS HAYCRAFT, ET AL. IN OPPOSITION

The Respondents, John E. Haycraft, et al., oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Both the Sixth Circuit Order of March 11, 1977, dismissing the appeal as unsubstantial and the District Court's opinion of May 18, 1976, are unreported and appear in the Petition.

QUESTIONS PRESENTED

1. When a federal district court has approved and implemented a desegregation plan that succeeds in eliminating all vestiges of state-imposed segregation, and an intervening party proposes a desegregation plan that does not provide for the desegregation of racially identifiable black schools, on the premise that white parents will refuse to send their children to such schools, whether the court abuses its discretion in refusing to replace the former plan with the plan proposed by the intervening party.

2. When a school district located in a state where racial segregation was required by state law has failed to convert to a unitary system and has maintained a large number of racially identifiable schools, whether a federal district court exceeds its remedial powers by ordering a desegregation plan that eliminates all racially identifiable black schools within the district.

STATEMENT OF THE CASE

The Statement of the Case submitted by the Petitioner does not give the complete history of the present case, and fails to discuss the matter of the merger of the former Louisville school district with the Jefferson County district into a consolidated district. It also misrepresents the holding of the Sixth Circuit when this case was first before it. *Newburg Area Council, Inc.* v. *Board of Education of Jefferson County, Kentucky*, 489 F. 2d 925 (6th Cir., 1973). The respondents will endeavor to set forth the complete history of the

case and to correct the Petitioner's omissions and misrepresentations.

In this case the Respondents sought a determination that both the former Louisville school district and the Jefferson County district had failed to eliminate all vestiges of state-imposed segregation from their districts and further sought the imposition of an inter-district desegregation plan. Based on the undisputed evidence presented in the District Court, the Sixth Circuit found that both districts had failed to eliminate all vestiges of state-imposed segregation and that in the circumstances of this case, inter-district relief was appropriate. With respect to Jefferson County, the Sixth Circuit found that the district had maintained Newburg, a pre-Brown black school, as a black school to the present time, and in addition, that it was maintaining two later-constructed schools, Price and Cane Run, as racially identifiable black schools. Although only 4% of the students enrolled in the Jefferson County district were black, these three elementary schools contained 56% of those students. 489 F. 2d at 928.

In the Louisville district, where approximately 50% of the students were black, the Court found the same situation that this Court found present in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), and based its holding on *Swann*. It found that five of the six senior high schools, nine of the thirteen junior high schools and forty of the forty-six elementary schools were racially identifiable schools.[1]

[1]Three of the senior high schools, five of the junior high schools, and nineteen of the elementary schools were racially identifiable black schools. Only nineteen of the district's sixty-five schools were not racially identifiable.

Fifty-six of the district's schools were pre-*Brown* schools, and of these, thirty-five had never changed their racial composition.[2] Only nine schools had been constructed since *Brown*, six of which were racially identifiable with respect to student composition upon opening. 489 F. 2d at 930-931. The Court, applying the principles set forth by this Court in *Swann* to determine whether a district located in a state where school segregation was required by state law had converted to a unitary system, held that the large number of racially identifiable schools gave rise to a presumption that all vestiges of state-imposed segregation had not been eliminated. The burden then shifted to the school district to show that the racial composition of the schools, particularly the 35 pre-*Brown* schools that had not changed their racial composition, was not the result of past discriminatory action on its part, and as the Court noted, "This it has not done." 489 F. 2d at 931.

The Court also held that in the circumstances of this case, an inter-district remedy was necessary and prior to eliminate fully all vestiges of state-imposed segregation in both districts. 489 F. 2d at 932. Its holding on this point was vacated by this Court and the case remanded for reconsideration in light of *Milliken* v. *Bradley*, 418 U. S. 717 (1974); at 418 U. S.

[2]Although this point was not noted in the opinion, the record reveals that twenty-five of these schools were pre-*Brown* white schools and ten were pre-*Brown* black schools. Of the remaining twenty-one pre-*Brown* schools, nine were not racially identifiable. Twelve pre-*Brown* white schools had become racially identifiable black schools. All of these schools were located in the central and western portions of the district, and were built, generally, in close proximity to the black schools, to serve whites residing there. As the black population expanded in the central city and westward after Brown, these schools became racially identifiable black schools.

918 (1974). Upon reconsideration, the Sixth Circuit held that in light of the principles set forth in *Milliken*, an inter-district remedy was appropriate in the circumstances of this case. 510 F. 2d 1358 (6th Cir. 1974). Following that decision, the Louisville Board of Education instituted proceedings for the merger of the Louisville and Jefferson County districts, in accordance with Kentucky law, and on April 1, 1975, the Kentucky Board of Education ordered the merger of the two districts. Certiorari to review the judgment of the Sixth Circuit was denied by this Court. 421 U. S. 931 (1975).

When the District Court considered the adoption of a desegregation plan to eliminate all vestiges of state-imposed segregation in this case, it looked to Jefferson County as a whole rather than to the previously-separate Louisville and Jefferson County school districts, both because the Sixth Circuit had held that the imposition of an inter-district remedy was proper here and because the districts had now been merged.[3] The District Court rejected the desegregation plans that had been submitted to it and formulated its own desegregation plan. That plan focused on eliminating all of the racially identifiable black schools in Jefferson County. Since the black population of Jefferson County was approximately 20%, the District Court concluded that the black enrollment in any elementary school should not exceed 40%, and the black enrollment in any junior or senior high school should not exceed 35%. This plan required the assignment of a sub-

[3]Under Kentucky law, upon merger, the Jefferson County district succeeded to the rights and liabilities of the Louisville district.

stantial number of white students to formerly black schools, and the concomitant assignment of a substantial number of black students to formerly white schools. The Court also decreed that the black enrollment in the schools to which black students were assigned should not be less than 12% on the elementary school level, and 12.5% on the junior high school and senior high school level. Schools that had a black enrollment within these guidelines were exempt from reassignment. The reassignment required the busing of a number of black and white students, although, as the Court stated, it had endeavored to limit busing to the minimum that was necessary for the effective implementation of the plan. All of the schools within the school district were effectively desegregated under the Court's plan.

The school district contended on its appeal from the desegregation order that the desegregation was "excessive", both because it operated county-wide, and because it did not leave any schools with a black majority, the same contentions that are made by the present petitioner. These contentions were rejected by the Sixth Circuit, which affirmed the actions of the District Court, in all respects. *Cunningham* v. *Grayson*, 541 F. 2d 538 (6th Cir. 1976). Certiorari was denied by this Court. —— U. S. ——, 97 S. Ct. 812, *rehearing den.*, ——U. S. ——, 97 S. Ct. 1573 (1977).

The District Court had permitted the County Judge of Jefferson County, the president Petitioner, to intervene in the proceedings for the sole purpose of present-

ing an alternative desegregation plan.[4] Such a plan, prepared by Dr. James S. Coleman, who, according to the Petitioner, has now emerged as an opponent of busing, was presented to the Court, and a hearing was held on the plan on May 4, 1976. The plan provided for the desegregation of the three racially identifiable black elementary schools in the former Jefferson County district, but did not provide for the desegregation of the twenty-seven racially identifiable black schools in the former Louisville district. Black children attending those schools would be permitted to transfer to white schools within limits, and white children would be permitted to transfer to those schools. The reason why white children could not be compulsorily assigned to the racially identifiable black schools, according to Dr. Coleman, was that white parents would refuse to permit their children to attend schools located in black residential areas, as these schools generally were, and would withdraw their children from the public schools.[5]

[4]There is a serious question as to whether a constitutional case or controversy is presented between the Petitioner and the Respondents. The Petitioner, currently seeking re-election, claims to represent "all the people of Jefferson County," and his claim in that regard is indistinguishable from the claim of a state to represent its citizens, which ever since *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), this Court generally has found insufficient to present a case or controversy.

[5]Dr. Coleman was dead wrong in his dire prophecy. White parents in Jefferson County have sent their children to the former black schools, which are now no longer racially identifiable, and the black-white ratio of the Jefferson County school district is substantially the same today as it was at the start of the 1975-6 school year, when the plan was first implemented. Desegregation has worked in Jefferson County, and in Jefferson County, there are no longer black schools or white schools, just *schools* attended by children of both races. *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 442 (1968).

When counsel for the plaintiffs asked Dr. Coleman how the plan would eliminate racially identifiable black schools, Dr. Coleman responded as follows:

> "The plan does nct eliminate racially identifiable black schools, and I think no plan that is stable can do so, nor do I think it is proper—I think it is not a proper objective, because I think it's racially discriminatory." (Tr. Vol. IV, p. 84).

At this point the Court interrupted the examination and asked the witness a few questions of its own. Counsel for the plaintiffs then renewed the Motion to dismiss the intervention, which had been made earlier. After hearing arguments of counsel for both sides, and after hearing additional testimony from Dr. Coleman, in which he reaffirmed his view that white parents would not send their children to schools located in black residential areas, the Court granted the Motion. In so doing, it stated that it had been directed by the Sixth Circuit to eliminate all vestiges of state-imposed segregation, and as it concluded:

> "Now, as I see it, *there is no way to remove those vestiges* except to strike down those situations that exist in previously all black schools which do not destroy the racial identity of those schools." (Tr. Vol. IV, p. 97). (Emphasis added.)

The Petitioner appealed the dismissal to the United States Court of Appeals for the Sixth Circuit, which on March 11, 1977, dismissed the appeal as unsubstantial.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

Present

The Posture in Which the Case Arises Makes It an Inappropriate Vehicle to Review the Validity of the District Court's Desegregation Plan.

The present case arises only because the District Court, over the repeated objections of the plaintiffs, permitted the Petitioner, in his capacity as County Judge of Jefferson County, to intervene for the purpose of presenting an alternative desegregation plan. Assuming that the case presents a constitutional case or controversy between the parties, the substantive claim of the Petitioner is that the District Court was required to accept his alternative desegregation plan. The petition for certiorari, however, essentially attacks the desegregation plan that the District Court approved and does not address the question of whether the alternative desegregation plan presented by the Petitioner is itself constitutionally permissible. The validity of the District Court's desegregation plan was litigated in a case between the parties directly involved in this litigation—the plaintiffs and the school district—and was upheld by the Sixth Circuit. *Cunningham* v. *Grayson,* 541 F. 2d 538 (6th Cir. 1976). Review was sought by the school district, and was denied by this Court. —— U. S. ——, 97 S. Ct. 812, *rehearing den.,* U. S. ——, 97 S. Ct. 1573 (1977). It would appear rather strange for this Court, having twice denied re-

view when sought by the school board just this last Term, to turn around and grant review when it was sought by a limited intervenor, who is a candidate for re-election to a political office that has no school related duties. What this case involves, in the posture in which it arises, is not the question of the validity of the District Court's desegregation plan—which presumably was settled in *Grayson*—but the question of whether the District Court, having approved and implemented a desegregation plan that succeeded in eliminating all vestiges of state-imposed segregation, was required to scrap that plan and approve the plan presented by the Petitioner. It certainly was not required to do so if the plan presented by the Petitioner was constitutionally defective on its face.

The Petitioner seeks to have this Court overturn the District Court's desegregation plan on the ground that it requires "too much desegregation." His standing to raise that question and to seek this Court's review of that plan, it is submitted, depends on whether he would receive any benefit from a decision overturning that plan, *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U. S. 26 (1976), and if his plan is itself constitutionally defective, he lacks standing to seek review of the District Court's plan.

In the view of both the District Court and the Sixth Circuit, the plan presented by the Petitioner was constitutionally defective on its face, and they could reach no other conclusion under the applicable law as declared by this Court. The premise of the Petitioner's plan is that the District Court could not order the de-

segregation of racially identifiable black schools, because white parents would be unwilling to send their children to those schools. Apart from the fact that this premise is racist in tenor and has been demonstrated empirically in Jefferson County to be patently fallacious, it invokes the legally indefensible and long-discredited "white flight" objection to desegregation. As this Court has emphasized, the fear of "white flight" cannot be accepted as a reason for achieving anything less than the complete uprooting of the dual school system. *United States* v. *Scotland City Board of Education,* 407 U. S. 484, 491 (1972). In a school district where racial segregation was required by state law, the desegregation plan must eliminate all vestiges of state-imposed segregation, *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), and must achieve the greatest degree of actual desegregation, taking into account the practicalities of the situation. *Davis* v. *Board of School Commissioners,* 402 U. S. 33 (1971). A purported desegregation plan that does not try to desegregate racially identifiable black schools on the ground that white parents do not want their children to attend such schools is patently unconstitutional and defective on its face. It is a gratuitous insult to black-Americans—and demonstrates a degree of racism that is intolerable in a nation committed to racial equality.

Since the plan proposed by the Petitioner is constitutionally defective on its face, the Petitioner lacks standing to seek review of the validity of the District Court's desegregation plan. Even if that plan could be

challenged by an appropriate party on the ground that it requires "too much desegregation"—which it is submitted, it cannot—it cannot be challenged by the present Petitioner, because the Petitioner would derive no benefit from a declaration of its invalidity.[6] The District Court was clearly required, in view of the applicable decisions of this Court, to dismiss the Petitioner's plan out-of-hand, and since this is so, the present case cannot properly be used as a vehicle to review the validity of the District Court's desegregation plan.

II

This Case Presents No Substantial Question Calling for the Exercise of This Court's Discretionary Jurisdiction On Certiorari.

In *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), and *Davis* v. *Board of School Commissioners,* 402 U. S. 33 (1971), this Court set forth the criteria governing desegregation in school districts located in states where segregation was required by state law prior to *Brown.* In so doing, it emphasized that all vestiges of state-imposed segregation had to be eliminated in such districts and that the lower courts had broad discretion in formulating a plan that would achieve that objective. In the years since *Swann* it has consistently denied review in cases challenging the adequacy and validity of desegregation plans approved by the lower courts in such cases. See *e.g. Northcross* v. *Board of Education,* 416 U. S. 962

[6] With the possible exception that it may affect his political career.

(1974); *Medley* v. *School Board,* 414 U. S. 1172 (1974); *Goss* v. *Board of Education,* 414 U. S. 1171 (1974). It denied review and rehearing in the case at bar when it was sought by the school district. The present Petitioner had advanced no reasons showing why in this case this Court should depart from what appears to be its settled certiorari practice.

It is rather novel to see it argued after *Swann* that in a school district located in a state where racial segregation was required by state law, a decree that eliminates the racially identifiable character of the former black schools is beyond the remedial powers of a federal court because it orders "too much desegregation." It must be emphasized that here *all* of the racially identifiable black schools were found to constitute vestiges of state-imposed segregation. In the Jefferson County district prior to its merger with the Louisville district, there were three racially identifiable black schools, one of which was a pre-*Brown* black school, and two of which became racially identifiable at a time when the district had not yet converted to a unitary system. 489 F. 2d at 928-929. In the former Louisville district, there were twenty-seven racially identifiable black schools, ten of which were pre-*Brown* black schools that had never changed their racial composition, twelve of which were pre-*Brown* white schools located in close proximity to pre-*Brown* black schools in conformity to the requirements of state-imposed segregation, which became black at a time when the district had not yet converted to a unitary system, and five of which were opened as racially identifiable black

schools, again at a time when the district had not yet converted to a unitary system. With respect to all of these schools, the board made no effort to show that their racially identifiable character was not the result of past or present discriminatory action on its part, as it was required to do by *Swann*, 402 U. S. at 26. 489 F. 2d at 931. Thus, *all* of these schools were found to constitute vestiges of state-imposed segregation.

If the desegregation had been limited to the former Jefferson County district alone, in which the black student population was only 4%, it would have been sufficient to eliminate the racially identifiable character of the three black schools, which would have resulted in the desegregation of a number of white schools, but which would not have required the desegregation of a number of other white schools in the country.

But with the ordering of an inter-district remedy by the Sixth Circuit and the *voluntary* merger of the Louisville and Jefferson County districts, it was within the power and duty of the District Court to include all of the schools in Jefferson County in the desegregation plan if the Court concluded, as it did, that this was necessary, in order to eliminate effectively the racially identifiable character of the twenty-seven black schools in Louisville. The District Court accomplished the desegregation of these schools by clustering each of them with a number of white schools, and by providing wide tolerances in the black-white ratios, particularly at the elementary school level, it minimized the extent of busing that was required. In other words, the District Court did not attempt, as the Petitioner charges, to

eliminate the racially identifiable character of all of the schools in the Jefferson County school district. It attempted, as the Sixth Circuit specifically found in dismissing the Petitioner's appeal as unsubstantial, *to eliminate all the vestiges of state-imposed segregation in the school district,* and concentrated on the racially-identifiable black schools. In so doing, it also eliminated the racially-identifiable character of the white schools that were vestiges of state-imposed segregation, *e.g.*, the twenty-five pre-*Brown* white schools in the former Louisville district that had never changed their racial composition, the few post-*Brown* white schools that the Louisville district had constructed, and the white schools in the former Jefferson County district that would have been desegregated if that district had not been maintaining three schools as black schools.

In effect, what the Petitioner is complaining about is the inclusion of the white schools in Jefferson County in the desegregation plan. Their inclusion, however, was necessary in order to eliminate the racially identifiable character of the black schools in the former Louisville district, and was proper, both because the Sixth Circuit had held that under the *Milliken* guidelines, an inter-district remedy was appropriate and because at the time the desegregation plan was imposed, the former Louisville district was now a part of the Jefferson County district so it was then an intra-district remedy. It clearly was within the discretion of the District Court to include all of the county's white schools the desegregation plan when it concluded that

this was necessary in order to eliminate effectively the racially identifiable character of the black schools.

What the Petitioner seems to be arguing is that county-wide desegregation cannot be ordered here because there was no proof in the case of county-wide segregatory intent. In so doing, he has completely confused or deliberately misstated the criteria for the remedying of *de jure* segregation in a school district located in a state where racial segregation was required by state law, and the criteria for remedying *de jure* segregation in a school district located in a state where racial segregation was not required by state law, but where the school district nonetheless was practicing *de jure* segregation. In the latter situation, the predicate for a finding of *de jure* segregation is proof of intent to segregate, *Keyes* v. *School District No. 1, Denver,* 413 U. S. 189 (1973), and in order for a system-wide remedy to be appropriate, it is necessary that the intent to segregate be shown to exist on a system-wide basis. *Dayton Board of Education* v. *Brinkman,* —— U. S. ——, 97 S. Ct. 2766 (1977). But in a school district located in a state where racial segregation was required by state law, the intent to segregate system-wide is not in issue: the intent to segregate system-wide is provided by state laws which require that *all* schools be racially segregated. It was pursuant to the laws of the State of Kentucky requiring racial segregation in *all* of the schools that the Jefferson County school district and the Louisville school district were administered, and it was pursuant to those laws that system-wide racial segregation was imposed in both districts.

Under *Swann,* all vestiges of state-imposed segregation had to be eliminated in Jefferson County, Kentucky, and that is precisely what the District Court's plan required.

Thus, the Petitioner's reliance on *Brinkman* and the other cases involving the establishment of *de jure* segregation under the intent to segregate criteria is completely misplaced and indeed frivolous. The Petitioner states that in these cases this Court has "once again made clear that the law does not require the elimination of all racially identifiable schools" (Supplemental Brief, p. 6), which is true. He also states that, "even in a system which has once practiced segregation by law, such schools are not necessarily a vestige of state-imposed segregation if, in fact, they were not caused by it" (*Id.*), which is also true. What the Petitioner fails to understand, however, is this Court's holding in *Swann* to the effect that where racially identifiable schools do exist in a system located in a state where racial segregation was required by state law, the burden is on the school board to show that their racially identifiable character is not the result of past or present racial discrimination. Failing or refusing to understand this, he also fails to realize that in the case at bar, the racially identifiable character of the black schools in the former Jefferson County and the former Louisville school districts were found to constitute vestiges of state-imposed segregation, precisely because no such showing was or could have been made. This being so, their racially identifiable character was required to be eliminated, as was done under the District Court's plan.

The most absurd contention of the Petitioner is the contention that proof should be taken on "whether or not the admitted racial identifiability of certain schools is in any way a result or increment of any impermissible state action." (Supplemental Brief, p. 11). This question was answered definitively some four years previously when the case was first before the Sixth Circuit. The impermissible state action that resulted in the admitted racial identifiability of some 30 schools in Jefferson County, Kentucky, was the law of Kentucky requiring racial segregation in the schools, pursuant to which racially identifiable black schools were established by the Jefferson County and the Louisville school districts, and the actions of those districts, not only in failing to carry out their constitutional duty to desegregate those schools, but in creating more racially identifiable black schools at a time when they were maintaining a constitutionally impermissible dual school system.

The District Court's desegregation plan successfully eliminated all vestiges of state-imposed segregation in Jefferson County, Kentucky. It conforms to the criteria established by this Court in *Swann*. Above all, it has worked. In Jefferson County, Kentucky, today, there are no black schools or white schools, just schools attended by children of both races. *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 442 (1968). There is no basis whatsoever for this Court, in the exercise of its discretionary jurisdiction on certiorari, to review the validity of that plan on the ground that it orders "too much desegregation."

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of September 1977, three copies of the Response to a Petition for a Writ of Certiorari were personally served on: J. Bruce Miller, 1122 Kentucky Home Life Building, Louisville; Ben J. Talbott, 501 South Second Street, Louisville, Kentucky; Will H. Fulton, 1st National Tower, Louisville, Kentucky, said counsel representing the parties required to be served, and said service having conformed to the requirements of Rule 21(1) and Rule 23 of the Supreme Court rules.

THOMAS L. HOGAN

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1755

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - - Petitioner

versus

JOHN E. HAYCRAFT, et al. - - Respondents

versus

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - Respondents

(Other parties respondent on inside cover)

BRIEF OF RESPONDENTS, BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL.

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Additional Respondents in this case are Lyman Johnson, Richard Miller, Aaron Howard, John Schmidt, Earl Alluisi, John R. Hughes, Sarah White, Johnie Wright, Suzanne Post, Hazel K. Lane, American Federation of Teachers, Jefferson County Federation of Teachers, Local 672, and the Kentucky Human Relations Commission.

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v.

JOHN E. HAYCRAFT, et al. - - *Respondents*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - - *Respondents*

BRIEF OF RESPONDENTS, BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL.

STATEMENT OF THE CASE

The District Court in 1973 in consolidated desegregation cases involving the City of Louisville, Kentucky and Jefferson County, Kentucky, dismissed the Complaint of civil rights plaintiffs, and determined that the two school systems were unitary and not in violation of the Constitution. The United States Court of Appeals for the Sixth Circuit, in *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky*, 489 F. 2d 925 (1973) remanded to the Dis-

trict Court with directions to eliminate "all vestiges of state-imposed segregation". This Court vacated the judgment of the Court of Appeals in light of *Milliken* v. *Bradley,* 418 U. S. 717 (1974), and the Court of Appeals reinstated, with minor modifications, its Judgment in 1974, 510 F. 2d 1358. This Court denied certiorari in 1975, 421 U. S. 931, 95 S. Ct. 1658, 44 L. Ed. 2d 88. In the consolidated cases, *Cunningham* v. *Grayson and Newburg Area Council, Inc., et al.* v. *Board of Education of Jefferson County* and *Haycraft, et al.* v. *Board of Education of Jefferson County,* 541 F. 2d 538, the Court of Appeals, on August 23, 1976, approved the District Court's adoption of a desegregation plan using system-wide racial compositions which the Board contended were arbitrary racial ratios and exceeded the remedial discretion of the District Court in light of the constitutional violation found to exist by the Court of Appeals previously. The Board of Education sought certiorari in this Court which was denied in 1977, —— U. S. ——, 97 S. Ct. 813, rehearing was denied in —— U. S. ——, —— S. Ct. ——, 45 L.W. 3635 (March, 1977).

While the foregoing proceedings were in progress, Petitioner in this action, L. J. Hollenbach, County Judge, had obtained the authority of the District Court to intervene for the purpose of bringing before the District Court an alternative desegregation plan.

On May 18, 1976, the District Court conducted an evidentiary hearing and during the testimony of Professor James C. Coleman, a sociologist, the first witness introduced by the Intervenor, dismissed the Intervenor,

out of hand (Appendix, pages 113-114). The Court of Appeals, on March 11, 1977, dismissed the Intervenor's appeal as unsubstantial, denying oral argument (Appendix, pages 25-26). The Intervenor filed a timely petition for writ of certiorari on June 8, 1977.

The Respondents, Board of Education of Jefferson County, Kentucky and Ernest Grayson, Superintendent, support the position of the Intervenor in his contention that the District Court and the Court of Appeals have erroneously approved the imposition of a system-wide remedy which raises racial ratios to a substantive constitutional right without regard to the degree of constitutional violation.

ARGUMENT

Had the Petitioner-Intervenor confined the petition for writ of certiorari to the sole question of whether or not the District Court and the Court of Appeals denied the Intervenor due process and the full hearing on the merits to which the Intervenor was entitled, the Respondents, Board of Education and its Superintendent, would have less reason to respond to the Petition. However, the Petitioner-Intervenor not only addresses this procedural question, but also undertakes to urge substantive aspects as to the merits of the Intervenor's plan.

The Respondents, having had no opportunity to cross-examine the Intervenor's witnesses, are unable to determine what position the Board would take as to the constitutionality and administrative feasibility of such a plan and accordingly, the Board of Education, in the

Court of Appeals, concurred with the Intervenor's request that the case be remanded to the District Judge for an appropriate evidentiary hearing with instructions concerning the proper determination of the Intervenor's plan as an adequate and appropriate remedy for any consitutional violation found to exist.

The Intervenor correctly asserts that this Court's decisions in *Washington* v. *Davis,* 426 U. S. 220, 96 S. Ct. 2040 (1975), and in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* —— U. S. ——, 97 S. Ct. 555 (1977), and in *Austin Independent School District* v. *United States,* 97 S. Ct. 518 (1976), determined that the Constitution does not require the elimination of *all* racially identifiable schools where the racial character of those schools *is not* the result of wrongful state action. These cases, and the more recent decision of this Court in *Dayton Board of Education* v. *Brinkman,* 76-539, —— U. S. ——, —— L.W. ——, in which an opinion was rendered June 27, 1977, require the District and Appellate courts to survey the current condition of segregation resulting from intentional state action and to take such appropriate remedial steps as will correct the situation.

The Court of Appeals in its opinion overturning the District Court's findings that there was a unitary system in Jefferson County and detecting the existence of some vestiges of state-imposed segregation, did not find evidence that but for such violation, Louisville and Jefferson County school systems would have been integrated to the extent contemplated by the plan later imposed by the District Judge.

The observation in the opinion of Mr. Justice Powell in *Austin, supra,* seems particularly appropriate:

> "The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was co-extensive with the constitutional violations, it adopted a view of constitutional obligation of a school board far exceeding anything required by this Court." *Austin, supra,* at 519.

As we read the opinion in *Dayton,* where the lower court's order rested on a finding of three violations consisting of racially imbalanced schools, optional attendance zones and rescinding by the Board of certain resolutions, this Court determined that even when those findings were judged in the strongest light favorable to the plaintiffs in the case, "the court of appeals simply hadn't any warrant for imposing the system-wide remedy".

There was never a finding by the District Court or the Court of Appeals in the Louisville and Jefferson County cases *(Newburg Area Council* v. *Board of Education of Jefferson County, Ky.* and *Cunningham* v. *Grayson, supra)* of what incremental segregative effect any of the violations by either school system had on the racial distribution of the Louisville and Jefferson County school populations as then constituted. The Court of Appeals, in overturning the District

Court, merely found that there were vestiges of state-imposed segregation remaining, without defining those vestiges. In its opinion approving the District Court's ultimate plan, *Cunningham* v. *Grayson*, 541 F. 2d 538 (1976), the Court of Appeals seized upon language that it found in the *Keyes* case that "whether a school system is illegally segregated by reason of statutory separation of the races or by reason of past segregative acts of school authorities, the scope of the remedy must in either case be system-wide."

There was no attempt by the District Court or the Court of Appeals to design a remedy commensurate with the impact of whatever intentional segregation was found, but on the contrary, a system-wide remedy imposing inflexible racial ratios (each school must have a white majority) was imposed by the District Court and approved by the Court of Appeals simply because it concluded that where the school system fails to propose a constitutionally sufficient desegregation plan, "the scope of a District Court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies". The Court of Appeals concluded that the District Court's plan was "well within the district judge's judicial discretion". This, of course, begs the question, since the Court of Appeals in its opinion overturning the District Judge, gave no direction as to the nature of what intentional state action the school board had participated in nor what degree of segregation resulted therefrom as opposed to the segregation within the system directly at-

tributable to social factors over which the school board had no control.

The colloquy between the District Judge and counsel for the Intervenor found at pages 110 to 112 of the Appendix herein and the Memorandum Order and Opinion dismissing the Intervenor (Appendix, page 113), plainly demonstrate that the District Court and subsequently the Court of Appeals concluded that regardless of the cause thereof any school which was *racially identifiable* in the school system was a vestige of former invalid state law and therefore state action requiring a *system-wide remedy*.

We think that the District Court and the Court of Appeals erroneously concluded that the imposition of a system-wide remedy was *the only way* to correct the constitutional violations found to exist in Jefferson County, Kentucky.

CONCLUSION

We respectfully submit that this Court should grant the petition for writ of certiorari by the Intervenor. We urge the Court to remand this matter to the District Court for a determination as to the school board's role in the creation of segregation (state action) requiring the District Court to reconsider, and if necessary, to receive additional evidence on the subject of intentional discrimination on the part of the school board and requiring the District Court to make a finding as to the incremental segregative effect of the school board's violations, and further requiring the District

Court to design a remedy commensurate with this impact. Thus, Louisville and Jefferson County will receive the same treatment as Dayton for the same legal reasons.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Nos. [redacted] 76-1755

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - Petitioners

versus

NEWBURG AREA COUNCIL, INC., JOHN E. HAYCRAFT, et al. - - Respondents

L. J. HOLLENBACH III, County Judge - Intervenor

(Other parties respondent on inside cover)

SUPPLEMENTAL BRIEF

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Additional Respondents in Board of Education of Jefferson County v. Haycraft:

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v.

NEWBURG AREA COUNCIL, INC.,
JOHN E. HAYCRAFT, ET. AL. - - - *Respondents*

L. J. HOLLENBACH III, County Judge - *Intervenor*

(Other Parties Respondent on inside cover)

MOTION TO CONSOLIDATE

Come the Board of Education of Jefferson County, Kentucky and Ernest Grayson, Superintendent, by counsel, and move this Court to consolidate the Petitions for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Nos. 76-710 and 76-1755, for consideration in light of this Court's decision in *Dayton Board of Education* v. *Brinkman*, —— U. S. —— (1977), 97 S. Ct. 2766. The Movants further pray that this Court grant the consolidated petitions for writ of certiorari to the United States Court of Appeals for the Sixth Circuit, vacating the decisions of such court as set out in the petitions, as supplemented, and re-

manding this matter for further consideration in light of *Dayton* and this Court's landmark decision in *Washington* v. *Davis*, 426 U. S. 229 (1976).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

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BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - - *Petitioners*

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L. J. HOLLENBACH III, County Judge - *Intervenor*

(Other Parties Respondent on inside cover)

SUPPLEMENTAL BRIEF

I. STATEMENT OF QUESTIONS PRESENTED

A. Does the admitted racial imbalance in the Jefferson County School System evidence sufficient discriminatory intent to support a finding of unconstitutional state action?

B. Where there has been no finding of a system-wide impact on racial balance by alleged state action, can massive system-wide busing nevertheless be imposed?

C. Can a Court of equity impose a degree of racial balance in excess of that which would have resulted but for the alleged unconstitutional state action?

D. Is the remedial imposition of a particular degree of racial balance constitutionally justifiable?

II. STATEMENT OF THE CASE

These cases arise out of desegregation litigation concerning the Louisville, Kentucky metropolitan area. The petitions for writ of certiorari, timely filed during the October, 1976 Term, set out in detail the procedural history of these cases.

The present petitions for writ of certiorari both arise out of the desegregation order of the District Court entered on July 30, 1975. The Petitioner in No. 76-710, Board of Education of Jefferson County, Ky. (Board of Education), was charged with the implementation of such desegregation order. The Intervenor-Petitioner (No. 76-1755), L. J. Hollenbach, County Judge, intervened in this matter on motion when the tremendous impact of the desegregation plan became evident.

The Court of Appeals approved the sweeping desegregation plan of the District Court in *Cunningham* v. *Grayson*, 541 F. 2d 538 (6th Cir. 1976). The Board of Education timely filed its petition for writ of certiorari directed specifically at this decision of the Court of Appeals. However, on January 21, 1977, the Board of Education filed a supplemental brief in light of this Court's decision in *Austin Independent School District* v. *United States*, 429 U. S. 990 (1976), asking that this Court also reconsider the initial decision of the United States Court of Appeals for the Sixth Circuit delineating the existence of a constitutional violation. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973), *vac. on other grounds*, 418 U. S. 918 (1974).

The Board of Education's petition was denied by this Court without comment. *Cunningham, supra, cert. den.*, —— U. S. —— (1977), 97 S. Ct. 812. The Board of Education subsequently filed a timely petition for rehearing in light of this Court's contemporaneous grant of certiorari in the *Dayton* case. The petition for rehearing was denied. *Cunningham, supra, reh. den.*, —— U. S. —— (1977), 97 S. Ct. 1573.

Petitioner Hollenbach intervened in the desegregation litigation both at the district court level and in the Court of Appeals for two apparent reasons. First, to support the substantive position of the Board of Education with respect to the plan of desegregation of the District Court affirmed in *Cunningham, supra,* and secondly, to submit to the District Court an Alternative Plan of Desegregation considerably narrower than the plan adopted by the District Court but nevertheless specifically designed to meet the standards enunciated by this Court. Judge Hollenbach was given a cursory opportunity to begin the presentation to the District Court of his Alternative Plan, but he was summarily dismissed as a party by the District Court upon its determination that such plan would not eradicate *racial imbalance* in the Jefferson County, Kentucky schools.

The United States Court of Appeals for the Sixth Circuit dismissed, on motion, the appeal prosecuted from the district court by Judge Hollenbach, relying upon this Court's denial of certiorari in *Cunningham, supra,* (No. 76-710).

After this Court's decision in *Dayton,* the Board of Education filed before the close of the October 1976

Term its motion to allow the filing of a petition for rehearing in light of the holding in *Dayton*. That motion is still pending before the Court. On August 16, 1977, County Judge Hollenbach filed a supplemental brief in support of his petition (No. 76-1755) analyzing the considerable impact of the *Dayton* decision on his petition for certiorari. In such supplemental brief County Judge Hollenbach requested additional procedural relief substantially similar to the relief sought by the Board of Education in No. 76-710.

This motion to consolidate and brief in support are filed by the Board of Education by way of response to the letter of this Court's Clerk of September 6, 1977 directing counsel for the desegregation plaintiffs to file a response to the petition for certiorari and supplemental brief in No. 76-1755.

III. REASONS FOR CONSOLIDATION AND GRANTING THE WRIT

The petitions for writ of certiorari to the United States Court of Appeals for the Sixth Circuit (Nos. 76-710 and 76-1755), as supplemented in both cases, concern identical substantive questions in their present procedural posture. Specifically, the questions which this Court must resolve in its consideration of the petitions are whether or not the Court of Appeals correctly applied the constitutional standards enunciated in *Washington* v. *Davis* and *Dayton* in determining both the existence of unconstitutional state action and the nature and extent of the remedy required to eliminate the vestiges of any such impermissible activity.

County Judge Hollenbach also raises the ancillary issue in his petition of the constitutional propriety of his Alternative Plan. That issue cannot be reached, however, until the preceding decisions of the Court of Appeals are scrutinized in light of *Washington* v. *Davis* and *Dayton*. The propriety of *any* specific remedy cannot be placed in proper perspective until the Court of Appeals' initial reversal of the District Court's finding (that no constitutional violation existed) is thoroughly re-examined in light of this Court's recent decisions.

During the October 1976 Term this Court by its decisions in *Austin* and *Dayton* confirmed the application of the rationale of *Washington* v. *Davis* to desegregation litigation. These decisions concerned both the proper standard for the determination of the existence of a constitutional violation and the questions involved with the fashioning of a desegregation remedy designed to eliminate the vestiges of unconstitutional state action.

In these consolidated actions this Court is again confronted with both the determination of a violation and the fashioning of a remedy for any such violation. The reason for the duplicity of these issues in all these cases flows directly from the utilization by the courts of appeals therein of an improper standard for the determination of a constitutional violation *ab initio*. Both the United States Court of Appeals for the Fifth Circuit in *Austin* and the United States Court of Appeals for the Sixth Circuit in *Dayton* (and in these cases) have erroneously equated the mere presence of *racial imbalance*, without more, with unconstitutional

state action. As racial imbalance, from whatever cause, is the misconceived constitutional standard required by the courts of appeals, desegregation plans solely designed to attain racial balance with commensurate system-wide massive busing are the inevitable result.

As the courts of appeals have generally followed this Court's admonition that the nature of the violation determines the scope of the remedy [*Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16 (1977)] this Court must now make an independent determination of whether or not the lower courts applied the appropriate standard for the determination of a constitutional violation initially where, as here, it has been determined that *racial imbalance* for whatever cause is unconstitutional *per se.* Here, as in *Dayton* and *Austin,* a system-wide massive busing remedy which strives solely and alone to attain a particular degree of racial balance represents the "fruit of the poisoned tree." It is no coincidence that the substantial societal restructuring required under such massive desegregation plans flows from the improper standard of racial balance required by the courts of appeals in these cases.

The unsound reasoning of the courts of appeals here, and in *Dayton* and *Austin,* illustrates the ultimate self-fulfilling prophecy. Racially imbalanced schools are deemed segregated and the "necessary" remedial plans are therefore designed specifically to eliminate racial imbalance. To repair the breach created by the lower courts through their misapplication of this Court's decisions in *Swann* and *Green* v. *County School Board of New Kent County,* 391 U. S. 430 (1968), all

cases such as these consolidated actions which are indistinguishable from *Dayton* and *Austin* must receive similar treatment at the hands of this Court. Please see *School District of Omaha* v. *United States,* —— U. S. —— (1977), 97 S. Ct. 2905 and *Brennan* v. *Armstrong,* —— U. S. —— (1977), 97 S. Ct. 2907. If this breach is not sealed completely, the application of *Washington* v. *Davis* to the school desegregation area in *Dayton* and *Austin* will be stripped of its significance and finality by attempts to distinguish what are for all relevant purposes identical cases.

A. The Presumption That the Mere Existence of Racially Imbalanced Schools, Without More, Is a Violation of the Fourteenth Amendment Conflicts With *Washington* v. *Davis*

For the purposes of this litigation the class action plaintiffs focused their interest on one primary sin allegedly perpetrated by the boards of education—the mere existence of racial imbalance in the schools operated by such school systems.[1]

Rather interestingly, plaintiffs made no claim that children in formerly all-black schools were subjected to sub-standard facilities or programs. The primary complaint of the plaintiffs was the racial identifiability of many schools resulting solely and alone from racial imbalances in the student population when compared

[1]Admittedly, criticism was made of teacher assignment patterns, but extensive teacher reassignment has now been undertaken and is not questioned by the Petitioners here. Additionally, the free transfer plan of the former Louisville school board has been drawn into issue. The undisputed finding of the District Court, however, reveals that the free transfer plan had no appreciable impact on pupil racial composition in any school (Addendum, p. 23a).

with the overall racial composition of the entire school system.

> We are proceeding in the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The *only problem* is that the schools are racially identifiable. (Emphasis by the Court, quoting from the opening statement of counsel for the plaintiff in Civil Action No. 7291-G, Addendum, p. 7a).

As the thrust of the plaintiffs' theory of recovery in this matter is grounded on the now discredited proposition that racial imbalance alone is presumptive of a constitutional violation, it is not surprising that the Court of Appeals adopted such a purported constitutional standard in reversing the District Court's finding that the school systems involved were indeed unitary in nature in spite of their history of *de jure* segregation. In its original decision in this matter the Court of Appeals unquestionably based its reversal of the findings of the District Court on the "racial identifiability" in both the former City and the former County schools. For this purpose it equated "racial identifiability" with racial imbalance.

> A school system that has had a history of state-imposed segregation has not fully converted to a unitary system when 56% of all its black elementary students attend 3 out of 74 elementary schools. *Newburg, supra,* 489 F. 2d 925, 929.

This reference to the former Jefferson County school system is paralleled in the Court of Appeals' discussion

of the alleged violations by the former Louisville Board of Education.

> A large number of *racially identifiable* schools in a school district that formerly practiced segregation by law gives rise to a presumption that all vestiges of state-imposed segregation have not been eliminated. . . . Regardless of any explanation for the racial composition of any of the other schools in the system, the 35 pre-*Brown* schools that have retained their pre-*Brown* racial identification to the present day stand out as clear vestiges of state-imposed segregation. *Newburg, supra,* 489 F. 2d 925, 930-31. (Emphasis added.)

In essence the Court of Appeals has added an even more infirm corollary to the proposition that the mere existence of racial imbalance is presumptive of a constitutional violation. The Court of Appeals has placed an affirmative duty on any school board with a history of prior *de jure* segregation to utilize cross-district busing to attain racial balance whenever the application of a facially neutral geographic zone assignment plan in the presence of neighborhood racial isolation produces racially imbalanced schools.

> Geographic zoning assignment is not a permissible method for a school board to employ in dismantling the dual system and eliminating all vestiges of state-imposed segregation if it does not work. *Newburg, supra,* 489 F. 2d 925, 931.

The point here, of course, is that it must "work" to produce *racial balance,* even though that is not a permissible goal for a desegregation remedy under the leading decisions of this Court.

In *Washington* v. *Davis* this Court clearly held that the state action requirement of the Fourteenth Amendment cannot be satisfied by a mere showing that some official act which is otherwise facially neutral merely has a disproportionate impact of some identifiable segment of the larger population in the absence of clear evidence of intent to discriminate.

> [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. . . . The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of Equal Protection Clause. *Washington* v. *Davis, supra,* 96 S. Ct. 2040, 2047-48. (Emphasis added.)

The significance of this constitutional standard is quickly shown in the school desegregation area where a school system has maintained a facially neutral geographic attendance zone assignment plan when racial isolation is present in the neighborhood residential patterns. Under such circumstances many schools in such a school system would of necessity be racially monolithic in character. The United States Court of Appeals for the Sixth Circuit has held in this matter that the Board of Education cannot adopt such a facially neutral assignment pattern in light of *de jure*

segregation prior to *Brown I. Newburg, supra,* 489 F. 2d 925, 930-31.

The adoption by this Court of the rationale of *Washington* v. *Davis* specifically discredits this crucial finding by the Court of Appeals concerning the nature of the alleged constitutional violation by the Board of Education.

> The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board. . . . It is clear from the findings of the District Court that Dayton has a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution. *Dayton, supra,* 97 S. Ct. 2772, 2774. *See also Austin, supra,* Powell concurring, discrediting the type of analysis which condemns *per se* the imposition of a racially neutral neighborhood school plan where it results in racially monolithic schools, 97 S. Ct. 517-518, fn. 1.

It should be noted that the District Court in the first instance *specifically* found that the racial imbalances in the schools operated by the Board of Education were due solely and alone to the imposition of an otherwise racially neutral neighborhood school assignment plan upon a typical metropolitan pattern of *residential* racial isolation over which the Board of Education had no control whatsoever (Addendum, pp. 24a, 31a-32a).

The Court of Appeals in reversing the District Court on the question of the existence of a constitutional violation did not disturb this crucial finding of fact by the District Court. Instead the Court of Appeals imposed a constitutional standard which has no support in the decisions of this Court to the effect that the utilization of such a neighborhood assignment pattern, without more, is a conclusive indication of unconstitutional state action.

Not only is such an analysis clearly in error on the question of the substantive law, it is also "important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system." *Dayton, supra,* 97 S. Ct. 2766, 2770. *See also Dayton, supra,* at 2773. This glaring error alone is sufficient to support the reinstatement by this Court of the original decisions in these matters entered by the District Court on March 8, 1973.

B. A Desegregation Order Directing a System-Wide Remedy in the Absence of a Showing of a System-Wide Violation Must Be Vacated Under *Dayton Board of Education* v. *Brinkman*

A merger between the former Louisville Independent school system and the Jefferson County school system was effected under state law on April 1, 1975. The only findings on which a constitutional violation could be based in this matter, however came during the trial of these cases on the merits before the District Court in December, 1972. The desegregation order

adopted on July 30, 1975 by the District Court, however, almost exclusively involves the busing of white former County school students and black former City school students. This situation, of course, indirectly results from the Court of Appeals' insistence on a degree of racial balance which could only be attained by the exchange of such students.

The Court of Appeals has compelled a system-wide remedy in the absence of any finding whatsoever of a system-wide violation in clear conflict with this Court's decision in *Dayton* to the effect that "the remedy must be designed to redress that [incremental] difference [in racial distribution], and only if there has been a system-wide impact may there be a system-wide remedy. *Dayton, supra,* 97 S. Ct. 2766, 2775.

This pragmatic workable standard fits well within the cause/effect analysis utilized in many of this Court's recent desegregation decisions. It has been held that a finding must be made that the unconstitutional state action was specifically a substantial cause of the present alleged difficulty here: racial imbalance. Please see *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976), 96 S. Ct. 2697, 2704, *Swann, supra,* 402 U. S. 1, 31-32, *Milliken* v. *Bradley,* 418 U. S. 717, 744-745 (1974).

The cause and effect analysis of *Milliken, supra,* is indeed particularly appropriate in light of the rationale adopted by this Court in *Washington* v. *Davis* as specifically extended to desegregation cases by *Dayton.* In this matter the only *possible* inter-district (i.e., system-wide) state action which could conceivably support a

system-wide remedy would be the practice prior to *Brown I* of the Jefferson County Board sending all black high school students on a tuition basis to Central High School which was run at that time by the former Louisville school system. The District Court in this matter, however, specifically found that the actions of the Jefferson County Board subsequent to *Brown I* completely removed any system-wide vestiges resulting from such prior state action (Addendum, p. 10a). This unreversed finding of the District Court is based, at least in part, on the clear fact that the state action in connection with Central High School has no incremental effect whatsoever at the present time on the racial distribution in the school system and thus is eliminated as a system-wide cause of racial imbalance and putative basis for system-wide relief.

> "Specifically, it must be shown that racially discriminatory acts of the state or local school districts, *or of a single school district* have been a *substantial cause* of inter-district segregation." *Milliken, supra,* 418 U. S. 717, 745. (Emphasis added.)

C. Under *Dayton* the Proponents of a Desegregation Plan Must Demonstrate That the Degree of Racial Balance Sought Thereunder Would Have Resulted *But For* the Unconstitutional State Action.

It is axiomatic in desegregation litigation that once a violation has been demonstrated, the nature of any such violation determines the scope of the violation. *Swann, supra,* 402 U. S. 1, 16. The difficulty with the desegregation orders imposed here and in *Austin* and *Dayton* is that they make no attempt whatsoever to be strictly proportional to the identified violations.[2] See *Dayton, supra,* 97 S. Ct. 2766, 2775, *Austin, supra,* 97 S. Ct. 517, 519, Powell concurring.

This Court has repeatedly recognized the difficulties of the trier of fact in attempting to ascertain the motives of public bodies. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, —— U. S. —— (1977), 97 S. Ct. 555. *Dayton, supra,* 97 S. Ct. 2766, 2772. Faced with the drastic over-utilization by the lower courts of massive wide scale busing in the absence of a correspondingly severe violation, this Court has now enunciated a pragmatic, workable standard to be applied when fashioning a school desegregation remedy.

Of necessity this standard involves *both* the nature of the violation *and* the scope of the remedy. It is particularly useful in appraising the actions of a large metropolitan school board against the background of

[2]This is due at least in part, no doubt, to the utilization of an incorrect constitutional standard for the determination of the existence of a constitutional violation at the outset as demonstrated hereinabove.

typical metropolitan neighborhood racial isolation. Please see *Austin, supra,* 97 S. Ct. 517, 519, Powell concurring.

> "The duty of both the District Court and of the Court of Appeals, in a case such as this, *where mandatory segregation* by law of the races in the schools *has long since ceased,* is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine *how much incremental segregative effect* these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." *Dayton, supra,* 97 S. Ct. 2766, 2775. (Emphasis added.)

Under this rationale, whenever a party proposes a remedy designed to effect a particular degree of racial balance, the proponent must establish that such degree of racial balance would have existed *but for* the proven constitutional violations. In the absence of such a limitation, any such remedy runs headlong into this Court's clear admonition against the elevation of a particular degree of racial balance to the level of a substantive constitutional right. *Swann, supra,* 402 U. S. 1, 23-24.

In his concurring opinion in *Austin,* Justice Powell also acknowledges the difficulty of fashioning a de-

segregation remedy for a large metropolitan school district, and suggests the following standard:

> "Thus, large-scale busing is permissible *only* where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary-age children." *Austin, supra,* 97 S. Ct. 517, 519. (Emphasis added.)

The District Court apparently anticipated this standard and specifically found *in the first instance* that the Jefferson County schools reflected a pupil racial balance which is *less segregated* than the neighborhoods served by such schools (Addendum, p. 24a). This undisputed finding was *not* reversed by the Court of Appeals. The record in this matter would clearly support the reversal of the Court of Appeals' original decision and the reinstatement of the original decisions of the District Court of March 8, 1973. In the interest of procedural fairness, this Court may wish, however, to remand this matter to the District Court for further proceedings in light of *Washington* v. *Davis. Dayton, supra,* 97 S. Ct. 2766, 2775.

D. A Desegregation Plan Which Permits Only 5% Deviation From the Racial "Norm" Conflicts With *Swann* v. *Charlotte-Mecklenburg Board of Education* By Elevating Racial Balance to a Substantive Constitutional Right

A final major issue in this litigation has been again emphasized by this Court's decision in *Dayton*, by virtue of the Court's renewed condemnation of "racial balance" desegregation plans. *Dayton, supra*, 97 S. Ct. 2766, 2774. The Dayton plan called for racial balances in *every* school within 15% of the racial balance of the school system as a whole. *Ibid*, 97 S. Ct. 2766, 2769. While this plan was clearly disproportionate to the enumerated constitutional violations, it also impermissibly raises racial balance to the level of a substantive right in contradiction of this Court's decisions. *Swann, supra*, 402 U. S. 1, 24, 28, *Milliken, supra*, 418 U. S. 717, 740-741, *Pasadena, supra*, 96 S. Ct. 2697, 2705.

The desegregation order in this case is also completely disproportionate to the alleged violation, but equally significantly it is even more stringent in its demand for racial balance than either the *Dayton* plan or the *Austin* plan in two respects. First, the tolerances under the desegregation plan here are considerably narrower in application than those in *Dayton*. Only 20% of all schools are allowed to vary more than 5% from the "norm," and less than 2% vary by more than 10%. If the *Dayton* tolerances of 15% were used here it is probable that less than half of the 23,000 pupils

bused under the present plan would require similar reassignment.

The Jefferson County plan more clearly reflects its impermissible goal of racial balance through its provision for perpetual realignment of the schools to insure their ongoing racial balance even after the implementation of the plan. This provision strips the Fourteenth Amendment of its state action component, but it also shows that the goal of the plan is to achieve a particular preconceived degree of racial balance rather than the mere elimination of the vestiges of state imposed segregation. *Swann, supra*, 402 U. S. 1, 31-32, *Austin, supra*, 97 S. Ct. 517, 518 fn. 3.[3]

[3]It should be finally noted that the District Court *has* implemented the perpetual realignment aspect of its desegregation plan by directing an additional remedy in the absence of *any* inquiry into the cause of the "imbalance." The Court of Appeals has already distinguished that action from the rationale of *Pasadena* on the ground that the schools never reached the proscribed racial balances. *Haycraft* v. *Board of Education of Jefferson County, Kentucky*, Slip Opinion, 6th Cir., 8-23-77, p. 3; Addendum, p. 34a.

IV. CONCLUSION

The petitions for certiorari, *in their present posture,* present substantial, essentially similar issues of considerable national importance which are of unquestioned significance to all children attending the public schools in Jefferson County and their families. *Austin, supra,* 97 S. Ct. 517, 519 fn. 7. The lower courts in this matter have misconstrued the decisions of this Court both with respect to the proper determination of a constitutional violation and the principles inherent to the creation of a remedy in an identical fashion to that of the lower courts in *Austin* and *Dayton.* As these cases are indistinguishable on all substantive issues, the result must be the same in order that *Austin* and *Dayton* will receive the significance and finality they demand. *See Omaha, supra,* and *Brennan* v. *Armstrong, supra.*

It is the position of the Board of Education that these petitions should be consolidated and summarily disposed of by this Court by reversal of the decisions below in the Court of Appeals and reinstatement of the original decisions of the District Court wherein the school system was held to be unitary (Addendum, pp. 1a-33a). In the alternative, this Court should, at the very least, adopt a procedural posture identical to the action taken in *Dayton,* remanding this matter directly to the District Court for the taking of additional evidence on the question of the existence of a constitutional violation in light of *Washington* v. *Davis.* This determination would be subject expressly to review by

the Court of Appeals. Only if an appropriately determined violation is found thereby would the fashioning of a remedy be required, and in no event would there be a system-wide remedy in the absence of a system-wide violation. *Dayton, supra,* 97 S. Ct. 2766, 2775.

Respectfully submitted,

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September 27, 1977

CERTIFICATE OF SERVICE

It is certified that three copies hereof were served by hand delivering same to Mr. Ben Talbott, Middleton, Reutlinger & Baird, 501 South Second Street, Louisville, Kentucky; Mr. J. Bruce Miller, Kentucky Home Life Building, Louisville, Kentucky; Mr. Henry A. Triplett, 231 South Fifth Street, Louisville, Kentucky; and Mr. Thomas Hogan, 701 West Walnut Street, Louisville, Kentucky, being all counsel required to be served. on 9-26-77

Will H. Fulton

JOHN A. FULTON—WILL H. FULTON

ADDENDUM

In the
UNITED STATES DISTRICT COURT
For the Western District of Kentucky
At Louisville
Civil Action No. 7045

NEWBURG AREA COUNCIL, INC., Mrs. Sarah White, Mrs. Johnie Mae Wright and Mrs. Suzanne Post, - - - - - - - - - *Plaintiffs*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KY., a Body Corporate and Richard Van Hoose, Superintendent, Jefferson County Public Schools, - - - - - - - - *Defendants*

MEMORANDUM OPINION AND JUDGMENT—
Entered March 8, 1973.

The Pleadings and Issues

On August 27, 1971, Newburg Area Council, Inc., a community organization in the black Newburg community of Jefferson County, Kentucky and three citizens filed an action against the Jefferson County Board of Education and its Superintendent. The action purported to be a class action on behalf of persons so numerous as to make it impractical to bring them before the Court and claimed that prior to 1955 the Board of Education of Jefferson County, in accordance with state law, maintained a racially segregated school system with white pupils and teachers assigned to certain schools and black pupils and teachers assigned to other schools. Admitting that the Board undertook, following the decision of the *Brown* case, to desegrate the

school system, plaintiffs contended that the efforts of the Board have not been sufficient and that all vestiges of state imposed segregation had not been eliminated from the school system. The thrust of the Complaint was that the Board had created and redrawn attendance zones in such a way as to increase, rather than reduce, the degree of racial segregation and, in particular, it was complained that the Board had rebuilt Cane Run Elementary School in such a manner as to increase segregation. It was further complained that the Board continued to maintain Newburg Elementary School as an all black school and had constructed new schools and redrawn attendance lines in other surrounding areas in such a method as to increase rather than to reduce racial segregation. The Complaint sought a declaratory judgment determining that the Board was not operating the school system in accordance with the requirements of the Constitution and that the Board should be required to take further steps to convert the school system to a unitary system, eliminating all vestiges of state imposed segregation and that the Board be required to draw attendance lines, select school sites, and make decisions relative to the closing of schools and the hiring and assignment of teachers so as to achieve the greatest possible degree of integration in the schools. Specifically, the Complaint demanded that the Board be required to present a plan providing for the desegration of Newburg Elementary School, Bashford Manor Elementary School and Goldsmith Elemenatry School; that the attendance zones for Price Elementary School, Watterson Elementary School and Klondike Elementary School be redrawn; that the pupils be reassigned; that attendance zones for Cane Run Elementary School and Schaffner Elementary School be redrawn and that bus routes and busing assignments be changed to conform to the new attendance zones.

Finally, the complaint sought to require the Board to present a plan requiring the Board to recruit black faculty

members so that at least four percent of all teachers employed by the system were black and that black faculty members be assigned to schools in the same proportions as black pupils are assigned to a particular school and that by the 1972-73 school year the black-white teacher ratio *in each school* shall correspond to the black-white teacher ratio *in the entire system.*

The Board of Education filed a timely answer in which it set forth the statistics relative to the size of the school system and the fact that all students in the school system were required to attend the school which is located in the school attendance zone in which they live. The Board admitted that it had complied with the statutes of the Commonwealth of Kentucky and the rules and regulations of the Department of Education of the Commonwealth of Kentucky with reference to the assignment of Caucasion and Negro children *prior to 1955.* The Board alleged that beginning in 1955, following the decision of the Supreme Court of the United States in the *Brown* case, it had begun to formulate plans to desegregate the school system and thereafter began to discontinue schools whose student body was 100% Negro and completed the integration of all students in grades 7 through 12 and took additional steps in an effort to remove and eliminate from the Jefferson County School system all vestiges of state imposed segregation. The Board asserted that the Newburg Elementary School had remained a school whose student body was nearly 100% Negro becanse of the fact that the population living in the attendance Zone in which the school was located was primarily Negro. The Board further alleged that it had on several occasions redrawn attendance zones so that Negro students were diverted from the Newburg Elementary School to newly constructed elementary schools in the Newburg area which previously had a predominantly white population.

With reference to the Cane Run Elementary School, the Board maintained it to be a school that was constructed to replace an original building, that its occupancy was anticipated in September of 1972 and that surveys of the area indicated that the location was the best possible geographic location to serve the school children in the area. The Board denied that it had knowledge or projections or information that the population of the Cane Run Elementary School attendance zone would be predominantly Negro and contended that when Schaffner Elementary School was constructed, attendance zones were redrawn so that overcrowded facilities of Mill Creek and Cane Run Schools were partially relieved by Schaffner. Cane Run at this time had only 17 Negro pupils. The Board stated that since 1954, the pupil population of the system had increased by a total of 62,000 students, of which approximately 2400 were Negroes.

With reference to teachers employed in the system, the Board admitted that the ratio of Negro teachers employed was not identical with the ratio of Negro pupils to white pupils in the school system but alleged that every effort was being made to enlist Negro teachers and that efforts were being made to integrate the faculties of the various schools as far as possible.

On June 22, 1972, John Haycraft and Hazel Lane filed Civil Action 7291-G which was brought by them against both the Board of Education of Louisville and the Board of Education of Jefferson County. That action was sponsored by the Kentucky Civil Liberties Union and, in particular, demanded that the Court transfer that part of the Jefferson County school district which lies within the corporate limits of the City of Louisville to the Louisville Independent School District. Such complaint set forth numerous allegations against the Louisville Board of Education, contending that it was maintaining a dual school system and was not taking the necessary and appropriate steps required to accomplish a unitary system. With reference to the Jefferson

County Board of Education, the Haycraft suit adopted by reference and incorporated all of the allegations of the complaint in the Newburg Area Council suit. This complaint, like the Newburg Area Council complaint, sought a declaratory judgment that the Louisville Board was not operating the Louisville Independent School District in accordance with the requirements of the Constitution and had not undertaken to eliminate all vestiges of state imposed segregation. It was further contended that the failure of the Louisville Board and the Jefferson County Board to include within the Louisville school district all territory within the corporate limits of the City of Louisville, commonly referred to as the "fringe area" and sixth-class cities physically located within the incorporated boundaries of the City of Louisville was in violation of the Constitution. It was demanded that the two Boards be required to execute an agreement providing for the transfer to the Louisville Independent School District the area within the corporate limits of the City of Louisville not now included within said district.

Subsequently, in July of 1972, intervening complaints were permitted by the Court on behalf of individuals represented by attorneys for the Kentucky Commission on Human Rights and by the Louisville and Jefferson County Federation of Teachers, Local No. 672. These intervening complaints, which joined the Anchorage Independent School District with the Board of Education of Louisville and the Board of Education of Jefferson County, sought to require that the three school systems be *merged into one county-wide school system* as the only appropriate means of accomplishing complete integration of the school systems and the abolition of all vestiges of state imposed segregation. The intervening plaintiff, Louisville and Jefferson County Federation of Teachers, Local 672, joined in the prayer for relief, demanding that all three of the school systems within

the county be merged and in particular sought protective remedies for the welfare of the teachers within the various school systems. So much for the pleadings.

Threshold Orders of the Court

Prior to the trial hereof, we entered certain threshold orders in both cases, to the effect that this Court lacked the judicial powers to order a crossing of political boundaries as between the Jefferson County, Louisville and Anchorage School Districts, and, since the Anchorage School District (a very small school district located in the Northeast portion of the county) was totally white, the Court, by final order with respect thereto, dismissed all proceedings against the Anchorage School District and its superintendent.

At the same time we directed separate trials, one immediately following the other, of the claims of all plantiffs against the Louisville Independent School District and then against the Jefferson County School District.

Succinctness dictates an explanation at this point as to our reasoning behind the aforementioned threshold orders.

First off, at that point in time (October, 1972), the prevailing law on the crossing of political boundaries in integration cases was as expressed in *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058. The Supreme Court of the United States had declined to advance that matter upon its docket. The Sixth Circuit had not spoken on the issue.

Though it has always been our personal judicial feeling that a situation might possibly be *envisioned*, wherein established discrimination was so *invidious* and *de jure* and further wherein the district court might be so *"locked in"* by existing political boundaries that its desegregation problem became *insusceptible of any solution other than* by the crossing of political boundary lines, that such might become legally acceptable; however, an examination by us of the pleadings in the instant matter and our knowledge of the

historical local situation did not support the possibility of proof of such a set of facts here, and, accordingly, we followed the Fourth Circuit rule. We believe our judgment in this regard was vindicated, for at commencement of trial renowned counsel for the plaintiffs stated his position in this Jefferson Board action to be the same as that taken in the immediately prior Louisville Board case, namely:

> "We are *not* contending here that schools are racially identifiable because of poor quality or because of substandard education. In *Swann*, the court indicated that those factors would be taken into account. We are proceeding on the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The *only problem* is that the schools are racially identifiable." (Emphasis ours.)

Further, we hasten to point out to our judicial superiors that in spite of the threshold orders, we allowed the plaintiffs in the trial of their case full latitude to develop any and all such proof, as they desired, relative to those facts which they thought justified the necessity of crossing political boundaries or pointed in that direction. Such is in the record. This precaution was taken by us that the Appellate Court would have before it, fully developed, *all* of the facts at issue; that no remand for basic factual finding would be required, in the event that Court, on appeal, found our threshold position to have been legally unsound.

Likewise, some explanation of our disposition of the intervening complaint against the Anchorage School Board is deserved. In that matter we felt the dismissal of Anchorage as a defendant was required, that our ruling as to crossing political boundaries be consistent, but we took such action fully cognizant of the fact that after development of the proof before us we had the power, if deemed necessary,

to order Anchorage again made a party and thus brought back before us. The Anchorage Independent School District has a total student enrollment of only some 300 pupils. Defense of this litigation by it (and as it turns out under our holding herein wholly unnecesary) would have caused serious financial problems to that small school district.

The Sixth Circuit, on December 8, 1972, in the *Bradley, et al.* v. *Milliken, Governor, et al.*, 72-1809 and 72-1814, spoke as to the crossing of political boundaries. It withdrew that opinion on January 14, 1973, and granted rehearing en banc. Therefore, we believe, in view of the unsettled legal state of affairs as to the boundary problem, by the development of the entire factual story, we have properly met our duty, whichever way the ball bounces.

This memorandum opinion and judgment relates solely to the claims against the Jefferson County Board of Education and its superintendent.

The Present Jefferson County School System

The evidence reveals that the Jefferson County School District encompasses approximately 280 square miles, as compared with the Louisville Independent District which contains approximately 65 square miles. The number of schools being operated by the Jefferson County Board is 103, of which 74 are elementary schools, 5 are middle schools and 18 are combined junior and senior high schools. In addition thereto, the Board operates 6 special type schools, including Ormsby Village, a custodial care for children, and a reception center for juveniles. The number of pupils in the Jefferson County school system at the end of the first pupil month, September 27, 1972, was 95,856, of which 92,163 were white and 3,693 were black so that the percentage of black students to white students in the entire system is 4.01%.

Since the middle schools operated by the County Board and the senior high schools operated by the County Board

are not criticized by the plaintiffs, it is appropriate at this juncture to state that the record reveals (Exhibit II A) that in the 74 elementary schools operated by the County Board, there are 44,896 white children, 1,774 black children, or a total of 46,670 students, of which 3.8% are black. Of a total number of 4,020 teachers in the Jefferson County system, 3,877 are white and 143 are black so that the percentage of black teachers to white teachers in the entire system is 3.6%. In addition thereto, among the certified administrators at the central office of the school system which total 100, 96 are white and 4 are black, or 4% thereof.

The method of pupil assignments in the County system is dictated entirely by the capacity of the school serving a particular district. The population of pupils is studied and boundary lines drawn to include the number of pupils which can be adequately housed by the school facility. Allowance is made for future growth when possible. Natural boundaries and methods of ingress and egress to the school are taken into consideration. There is *no transfer system* within the county school system and all pupils are assigned to the schools on the basis of residence. The school attendance zones are redrawn from time to time to reflect changes in the school population and the construction of new schools.

History of Integration in the Jefferson County School System

In 1955, the year following *Brown I*, the Jefferson County Schools had a pupil population of approximately 32,000 which included approximately 1,000 Negro pupils. At that time there were approximately 1,066 teachers, of whom 36 were Negro teachers. Prior to *Brown I*, Negro elementary pupils were housed in eight buildings. One was a twenty-room modern school while the others were small, one to four-room buildings. There were no high school facilities for Negro pupils since the County school system paid tuition and transportation for Negro high school students to

attend schools for blacks operated by, and within, the Independent School District of Louisville.

Following *Brown I* and beginning in 1956, the following steps were taken by the Jefferson County Board to accomplish integration. In 1956 Orell, a two-room school was discontinued and the Negro pupils were assigned to the school in the district in which they lived. Negro pupils in grades 1 to 6 were assigned to the elementary school in the district in which they lived, while those in grades 7 and 8 were sent to Butler and Valley High Schools, predominantly white schools. At Newburg, which was an all black school prior to *Brown I* children in the 9th grade were assigned to high schools of the county and many Negro pupils living in various sections of the county that had been attending Newburg prior to *Brown I* were assigned to previously all white schools in the districts in which they lived. All Negro pupils in grades 7 and 8 in the entire county were given a choice of remaining at the all Negro school or of enrolling in the high school in the district in which they lived. All pupils entering high school (grades 7 through 12) for the first time were *required* to enroll in a county high school which had been all white previously. Pupils previously enrolled on a tuition basis at Central High School in Louisville and Lincoln Institute in Shelby County were given a choice of entering a county high school or of finishing where they were already enrolled.

In 1957, two more Negro schools were discontinued, Worthington and Jefferson Jacobs. The Negro pupils were integrated in previously all white schools in the district in which they lived. Also in 1957 all 7th and 8th graders at Dorsey, Forrest and Griffeytown were integrated into high schools in the districts in which the pupils lived. Griffeytown, like Newburg, had historically been a black community. In 1958, all Negro pupils in the 7th and 8th grades at Jeffersontown Negro School and Newburg were

integrated by transferring them to previously all white schools in the district in which they lived and thus by 1958 there had been completed by the School Board integration of all pupils in grades 7 through 12 in all county schools. Only five schools with all Negro population then remained in existence. They were Newburg, Forrest, Dorsey, Griffeytown and Jeffersontown. The total pupil membership was 286 with ten black teachers.

In 1959 Griffeytown was discontinued as a black school; in 1961 Dorsey was discontinued and all of its pupils were assigned to integrated schools in the districts in which they lived; in 1961 also, grades 4, 5, and 6 were withdrawn from Forrest and sent to the integrated Middletown school. By 1963 the final steps of total integration were completed by abandoning the two-room, all Negro school at Forrest and the four-room, all Negro school at Jeffersontown. The pupils attending these two schools became a part of the membership of the schools in the district in which they resided.

While the Newburg school remained predominantly black, all pupils living within the Newburg district were required to attend and white pupils were enrolled on several occasions.

In 1963, the first step toward faculty integration was accomplished, since teachers in the Forrest and Jeffersontown Schools, which had been previously all black, were assigned to schools which had previously had all white faculties. In 1964, additional faculty integration was accomplished by placing black teachers in two previously all white school situations. We find that 1965-66 was the year in which a serious effort was made to integrate the Newburg faculty which had previously been all black. Teachers throughout the system were asked to express an interest in joining the Newburg faculty, and as a result thereof, four white teachers were brought into the faculty

at Newburg for the 1965-66 school year. By that date there were a total of 53 black teachers assigned to nine integrated faculties.

Continued progress in faculty integration was accomplished in 1966 and 1967 so that by the conclusion of that year, there were 63 black faculty members assigned to 15 different integrated faculties (Jefferson County Board Exhibit 30).

In 1967 and 1968, 1968-69 and 1969-70 school years, there was determined progress in faculty integration so that by the conclusion of the 1969-70 year, there were 91 black faculty members in 35 integrated faculties. The school year 1970-71 was an increasingly difficult year to employ black teachers because of the competition from industry with its higher salaries and in 1970-71, through retirement and other losses, the system actually lost numerically from the standpoint of integrated faculties so that at the end of 1971, there were only 86 black teachers in 35 integrated schools.

In 1971-72 the system accomplished its goal with reference to the Newburg faculty by reducing the number of black teachers at the Newburg school from 22 to 11. The evidence is undisputed that at the beginning of the 1972-73 year, there were 143 black teachers in 81 faculties, showing a net gain of 47% black faculty members. Fifty-two (52) new black teachers were employed for the 1972-73 school year but there had been actual offers made to 70 black teachers of whom 18 (25%) apparently, after having made application in good faith, refused positions offered (Jefferson County Exhibit 30). It is definitely established that the system has experienced difficulty in attempting to recruit black teachers to the predominantly white Jefferson County School system.

Attendance Zones

In 1966 the County Board began the erection of middle schools, which are schools housing pupils in the 6th, 7th

and 8th grades, and deliberately placed such middle schools adjacent to those areas where the percentage of blacks to non-blacks is high. The middle schools increased the geographical attendance area and thereby resulted in integrating the schools more desirably. For instance, a middle school was constructed on Indian Trail and opened in September of 1971, and another was constructed on Klondike Lane and opened in September of 1972, helping to further integrate those communities. At the Bruce Middle School on Indian Trail, opened in September of 1971, there were 70 black pupils or 8% of the pupil population; and at the Meyers Middle School, located on Klondike Lane and opened in 1972, there were 14% black pupils. The erection of these middle schools resulted in removing the sixth grade pupils from the Newburg School and thus again reduced the black population in the Newburg School and increased the black population in the newly erected middle school.

Issues and Contentions

Although the allegations of the complaint and intervening complaints leveled rather broad criticism at the Jefferson County school system, the evidence introduced narrows the issues between the parties very considerably. No complaint was made concerning the high schools and middle schools in the system or of the refusal of the Board of Education to permit optional attendance areas. Counsel for the plaintiffs conceded that from a curriculum standpoint and pupil-teacher ratio standpoint, there was no substandard educational program in any of the particular schools.

In short, the plaintiffs are contending that the Board has made discretionary decisions which retained vestiges of state imposed segregation by reason of the concentration of approximately 56% of the total number of black

elementary school children in three elementary schools, Newburg, Price and Cane Run. Plaintiffs maintaining that the policy of the Board has kept the Newburg school deliberately below capacity, while nearby white schools have been overcrowded to the point of using portable classrooms and double sessions. Plaintiffs insist that the only remedy for this situation is for the Board to *transport white elementary school children* into the Newburg school in order that this school may be racially balanced and to redraw the school attendance zones and/or to pair or cluster students in the Cane Run area in order to prevent the steady increase of black children in the Cane Run school.

The Board of Education, on the other hand, contends that its efforts to decrease the size of the Newburg Elementary School, to integrate its faculty, and to distribute black children living in the Newburg community into other adjoining areas containing elementary schools which are predominantly white, as well as the addition of a middle school on Klondike Lane, represent practical and workable solutions to the Board's responsibility to do away with all vestiges of state imposed segregation. In addition, the Board pointed out consideration that has been given to redrawing school attendance zones in the Cane Run-Schaffner area in order to lessen the impact of the sudden influx of black children who moved into the Cane Run area after the school was planned and erected. Finally, the Board insists that the plaintiffs' solution of requiring the Board to transport white children by cross-busing or in a "leap-frog" fashion into the Newburg and other elementary schools would not provide any permanent solution to the continuing responsibility of the school board to maintain a unitary school system.

We shall examine these contentions and issues in the light of the evidence introduced and in accordance with the guidelines laid down by the Supreme Court.

* * * * * * * *

In the

UNITED STATES DISTRICT COURT
For the Western District of Kentucky
At Louisville

Civil Action No. 7291-C

JOHN E. HAYCRAFT AND HAZEL K. LANE, - *Plaintiffs*

v.

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, a body corporate, NEWMAN WALKER, Superintendent, Louisville Public Schools, BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, a body corporate, and RICHARD VAN HOOSE, Superintendent, Jefferson County Public Schools, - - - - - - *Defendants*

MEMORANDUM OPINION AND JUDGMENT—Entered March 8, 1973

This action filed June 22, 1972, was tried to the Court on December 1-7, 1972. The Court has considered the voluminous testimony, the more than 130 exhibits, which were filed by agreement into the record, and upon the entire record herein now issues its Findings of Fact and Conclusions of Law and Judgment herein.

POSTURE OF THE LITIGATION

This is a school desegregation action[1] commenced by John E. Haycraft and Hazel K. Lane against the Board of Education of Louisville, Kentucky, the Board of Educa-

[1]Sponsored by the Kentucky Civil Liberties Union.

tion of Jefferson County, Kentucky, and their respective superintendents, seeking desegregation of the Louisville School District and demanding that the Court transfer so much of the Jefferson County School District as lies within the corporate limits of the City of Louisville into the Louisville School District.

By intervening complaint, Lyman Johnson, Richard Miller, Barbara Byrd, Aaron Howard, John R. Hughes, Teresa Black, John Schmidt and Earl Alluisi sue the Jefferson County Board of Education, the Board of Education of Louisville, the Anchorage, Kentucky Board of Education, and their respective superintendents, demanding complete desegregation of the three said school districts and further that the Court order a merger of the three districts.[2]

A second intervening complaint was filed, sponsored by the American Federation of Teachers, a labor organization which claims it represents some of the teachers in all systems, demanding that the Court not arbitrarily assign teachers merely to achieve a balanced faculty.

Prior to the trial hereof, we entered certain threshold orders, to the effect that this Court lacked the judicial power to order a crossing of political boundaries as between the Jefferson County, Louisville and Anchorage School Districts, and, since the Anchorage School District (a very small school district located in the northeast portion of the county) was totally white, the Court, by final order with respect thereto, dismissed all proceedings against the Anchorage School District and its superintendent.

At the same time we directed separate trials, one immediately following the other, as to the status of each of the Louisville Independent School District and the Jefferson County School District.

Succinctness dictates an explanation at this point as to our reasoning behind the aforementioned threshold orders.

[2]Sponsored by the Human Relations Commission and the NAACP.

First off, at that point in time (October, 1972), the prevailing law on the crossing of political boundaries in integration cases was as expressed in *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058. The Supreme Court of the United States had declined to advance that matter upon its docket. The Sixth Circuit has not spoken on the issue.

Though it has always been our personal judicial feeling that a situation might possibly be *envisioned*, wherein established discrimination was *so invidious* and *de jure* and further wherein the district court might be so *"locked in"* by existing political boundaries that its desegregation problem became *insusceptible of any solution other than* by the crossing of political boundary lines that such might become legally acceptable; however, an examination by us of the pleadings in the instant matter and our knowledge of the historical local situation did not support the possibility of proof of such a set of facts here, and, accordingly, we followed the Fourth Circuit rule. We believe our judgment in this regard was vindicated, for on trial date, in his opening statement, renowned counsel for the plaintiffs stated:

> "We are *not* contending here that schools are racially identifiable because of poor quality or because of substandard education. In Swann, the court indicated that those factors would be taken into account. We are proceeding in the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The *only problem* is that the schools are racially identifiable." (Emphasis ours.)

Further, we hasten to point out to our judicial superiors that in spite of the threshold orders, we allowed the plaintiffs in the trial of their case full latitude to develop any and all such proof, as they desired, relative to those facts

which they thought justified the necessity of crossing political boundaries or pointed in that direction. Such is in the record. This precaution was taken by us that the Appellate Court would have before it, fully developed, *all* of the facts at issue; that no remand for basic factual finding would be required, in the event that Court, on appeal, found our threshold position to have been legally unsound.

Additionally, it should be noted that there was simultaneously pending on our docket, and is disposed of by another of our Opinions this very day, Civil Action No. 7045, styled Newburg Area Council v. Board of Education of Jefferson County, and Louisville Independent School District. We tried both the instant Civil Action and Action No. 7045, one immediately following the other; first, all plaintiffs against the Louisville District and then all plaintiffs against Jefferson County Board of Education. This seemed the orderly way to handle the matter.

Likewise, some explanation of our disposition of the intervening complaint against the Anchorage School Board is deserved. In that matter we felt the dismissal of Anchorage as a defendant was required, that our ruling as to crossing political boundaries be consistent, but we took such action fully cognizant of the fact that after development of the proof before us we had the power, if deemed necessary, to order Anchorage again made a party and thus brought back before us. The Anchorage Independent School District has a total student enrollment of only some 300 pupils. Defense of this litigation by it (and as it turns out under our holding herein wholly unnecessary) would have caused serious financial problems to that small school district.

The Sixth Circuit, on December 8, 1972, in the *Bradley, et al.* v. *Milliken, Governor, et al.*, 72-1809 and 72-1814, spoke as to the crossing of political boundaries. It withdrew that opinion on January 14, 1973, and granted rehearing en banc. Therefore, we believe, in view of the unsettled legal state of affairs as to the boundary problem, by the development

of the entire factual story, we have properly met our duty whichever way the ball bounces.

This memorandum opinion and judgment relates solely to the claims against the Board of Education of Louisville, Kentucky and its superintendent.

ISSUES AND CONTENTIONS

Contrary to many similar actions which have reached the federal courts, the issues in this case are somewhat narrow.

Plaintiffs, in their opening remarks to the Court, admitted that *no* child, black or white, within the Louisville Independent School District was being denied an equal educational opportunity or was being required to attend a substandard facility. Thus, plaintiffs' case admittedly is bottomed on the proposition that because racial imbalance exists in some of Louisville's schools that this equals "vestiges of a dual school system" which is required to be dismantled under *Brown I, Brown* v. *Board of Education*, 347 U. S. 483 (1954), and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971).

Defendants contend, on the other hand, that *Brown I, supra*, though establishing segregation as being a deprivation of equal educational opportunity in violation of the Equal Protection Clause of the Fourteenth Amendment, did not require *every school* to reflect the racial ratio of the school district, and that Swann, *supra*, applied to *de jure* segregation, i.e., racial imbalance from discriminatory action, or inaction, of or by the authorities. Defendant concedes that once the plaintiffs have established racial imbalance in one or more of the schools (as established here) the burden is upon the defendant to come forward and show, to this Court's satisfaction, that the imbalance is not due to any invidiously discriminatory actions, or failures to act, by the Board or the State; that the imbalance results from factors beyond the authorities' control, though they have

made every reasonable and practicable efforts to maintain a unitary school system.

The contentions of the parties above-expressed, we believe to be the legal azimuth to be followed in the scope of our inquiry.

In the resolution of these contentions, we have considered testimony of the witnesses, numerous exhibits, demographic data, pupil desegregation, faculty desegregation, per pupil expenditure data, extracurricular activities, tip ratio data, whether the Louisville Board had done everything practical within its power to achieve maximum integration, whether or not a cross-transportation order would be legally required, the effect of the transfer policy, the effect of discontinuing old schools, the construction and addition of new schools, state action and the Board minutes since the commencement of the Board's desegregation efforts.

* * * * * * * *

GENERAL FACTS

The defendant Board of Education of Louisville, Kentucky is a body corporate, organized and existing under the laws of the Commonwealth of Kentucky (KRS 160.160). It is situated within the City of Louisville, a city of the first-class within Jefferson County, Kentucky. It manages and controls all of the public elementary, junior high and high schools within a geographical area known as the Louisville Independent School District. Its boundaries are not coterminous with the City of Louisville, Kentucky, and approximately 10,000 children live between the boundaries of the Louisville Independent District and the outer boundaries of the City of Louisville, Kentucky and attend the Jefferson County school system. Under Kentucky law, an independent school district's boundaries do not expand with the boundaries of the city by which it is embraced. (*Spragens* v. *Thomas*, 308 Ky. 97, 213 S. W. 2d 452.)

The school district is composed of four roughly identifiable areas known as the east end, central area, west end, and the south end. The south and east end are mostly populated by the white population while the west end is largely populated by the black population with a mixture of both in the central area. (See Exhibit 85). Formerly, the black population resided in the central area of the city, but after urban renewal (late 1950's and early 1960's) a large majority of the black population moved to and settled in the west end of the Louisville District. (See Exhibits 81, 82, 83 and 84). Louisville did not provide transportation for students before *Brown I*[3] and does not now.

At the commencement of the 1972-73 school year, the Louisville Board operated some 75 schools. The grade structure runs from kindergarten (kindergarten is not included in data) to grade twelve. There are nine high schools, two of which are vocational schools and one of which is a residential manpower center located at the old Lincoln Institute in Shelby County, Kentucky. There are thirteen junior high schools and forty-seven elementary schools. In addition, there is a three-level school located at the Brown Education Center at Fourth and Broadway designed for those children who showed some penchant toward excelling in creativity. This latter school, opened at the start of the 1972-73 school year, draws children from throughout the district.

As to the high schools (See Exhibit 88), Atherton, Iroquois and Shawnee are located in separate attendance zones; Male, Manual and Central are located in a common attendance zone (they being in closer proximity to one another) Ahrens (the new vocational school) and the Brown Education Center School have district-wide attendance zones. All of the junior high schools and all of the elementary schools have separate attendance zones and districts. (See Exhibits 86 and 87).

[3] *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954).

The total enrollment in the Louisville Independent District at the commencement of the 1972-73 school year was 45,570. White students constituted 22,637 of that total and black students 22,933. During the 1956-57 school year, there were 45,841 children enrolled, of which 12,010 were black and 33,831 were white. Thus, from 1956 to the present time, the white enrollment has decreased by approximately 11,000 pupils, and the black enrollment has increased by the same number. From 1956, the total school population increased from 45,841 until it peaked in 1967 at 51,262; thereafter, it began to decline until it reached the present population of 45,570.

Although black children constitute just over 50% of the total enrollment in the Louisville School District, the total citizen population of the District is approximately 23% black and 77% white. Over forty per cent of the children in the District system come from poverty level families with most of these (80%) being black.

The Louisville system has approximately 2,200 faculty members of whom 36% are black. Forty per cent of the system's central administrative staff is black.

The Louisville Board itself is composed of *three whites* and *two blacks*, all of whom *are elected at large* from within the Louisville Independent School District, a district in which white citizens outnumber black citizens 3 to 1; a strong indication to us of no manifest racial prejudice against blacks playing a viable role in the operation of the District School System. There has been black representation on the Louisville School Board since 1959.[4] An examination by us of the School Board minutes does not reflect any racial disharmony or polarization among the members of the Board.

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[4]Since the election of Hon. Woodford Porter in 1959, he being subsequently reelected and serving as Chairman of the Board 2 years and 7 months during his terms of office.

ASSIGNMENT PLAN

The student assignment plan used by the Louisville Board is described as a geographic zone plan with provisions for a transfer if there is room in the school to which the transfer is sought. This is not a warmed-over version of what the north calls "open enrollment" and the south calls "freedom of choice." Nor is it a neighborhood school plan in its entirety.

Zones are established to meet the needs of a surrounding community area as the need relates to the capacity of the school. There is no evidence in this case that the Board's student assignment plan or its method of establishing school attendance zones has contributed to the racial imbalance that exists in some of the Louisville schools. To the contrary, the latest figures reflect a negative differential of .07%, which means that 32 children are involved out of the total number of 4,000 children, who last school year applied for and received transfers. To put it another way, if one subtracts the number of students who transferred from a majority to a minority race situation from the number of students who transferred from a minority to a majority race situation, there is a net loss of 32 children in a more racially balanced situation out of more than 4,000 transfers. Plaintiffs presented no evidence to the contrary; aside from one of their witnesses, Neville Tucker, a former black Board member (from 1967-69) who thought it might have contributed to a greater racial imbalance, but who weakened as to how or why it did so, and then stated that *it was the Board's intention to achieve maximum integration under the transfer plan.* The Court so finds.

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ATTENDANCE ZONES

Insofar as the establishment of the attendance zones is concerned, the Court finds, and it is amply demonstrated by the demographic data, that the school population reflects the neighborhood. If the neighborhood is 76 to 100% black, the school will be 76 to 100% black. If the neighborhood is 0 to 25% black, the school will be 0 to 25% black. Specific testimony was given to those schools who before *Brown I, supra,* were black and are predominantly black today. In each instance, these schools *at some time in their history* since *Brown I, supra,* have had members of both races in attendance.

High Schools: Traditionally, long before *Brown I, supra,* the Louisville District had operated four high schools: three in the central portion of the City, they being Male High School, for those seeking a pre-college course; Manual High, for those seeking technical training; and Central High, which served the black population; and the fourth, Shawnee, in the west end, a girls' white high school. These schools had been erected in the center of the population areas they served.

As Louisville grew in population, the expansion was to the east, to the south, and to the southeast, requiring east-end and south-end high schools to be sorely needed. Thus, Atherton High School, as it is now constituted, was constructed in 1961 in the southeastern part of the City, but beyond the boundary of the Louisville Independent School District. In 1967, a junior high school (Gottschalk) was converted into a high school in the extreme southern part of the District and designated Iroquois High.

Central High School located in the central portion of the City is traditionally a black high school, having been such before *Brown I, supra.* A new Central High School was constructed in the year 1950. It is a prestigious and academically oriented school. Few white pupils have attended Central since Louisville's desegregation plan was put into operation in 1956; in fact, there are none there now. Before the year 1971, Central had a city-wide attendance zone as it offered specific programs not offered at other high schools. Since 1971, it has shared a common attendance zone with Male High School, 95% black, and Manual High School, 63% white. Central does have a biracial faculty (43% white), and its administrative leadership is biracial. A majority of the black students who attend Central come from the central zone, as reflected on Exhibit 85.

During the 1968 investigation by HEW of the above-referred to NAACP complaint, particular attention was paid to Central High School. At one stage of the HEW inquiry consideration was given to the suggestion that Central be paired with Ahrens Trade School and transportation between the two be furnished. Surprisingly, this suggestion was objected to by the NAACP (a sponsor in this litigation now before us) on the ground that if such pairing was done Central *would lose its identity.* Such objection did not, in and of itself, prevent the suggestion from being placed in operation, as there were meritorious reasons advanced and problems confronted which led to the final HEW conclusion that such would not be feasible. Those in the main being that vocational courses could not be installed at Central, designed for academic endeavors, without expensive and extensive remodeling, renovation, and that Ahrens lacked facilities for proper academic instruction, it having been initially designed in 1956 as solely a vocational institution. At that same time a rigid zone for Central was considered but it would not have appreciably resulted in any better racial balance at Central and would have, in fact, had no effect on the balance at Male High School, and would have widened the imbalance at Manual High School. HEW discarded this plan and did not recommend it. Another suggestion was considered by

HEW at that time, of pairing Central with Manual, but it was found that that would result only in widening the breach of racial balance at Manual. HEW gave no thought of pairing Central with Iroquois for everyone seemed to agree and we find, as hereinafter will be demonstrated when we discuss Iroquois, that such would have achieved no lasting balance and distance (approximately 6½ miles) was a very important factor.

Atherton High School as it is now constituted is located in the southeastern part of the City of Louisville, but outside the Louisville District. New Atherton was constructed in 1961, after seventeen (17) separate sites were considered before settling on a location that would meet state regulations and provide the necessary space. Atherton had formerly been located in the building now occupied by Woerner Junior High School. See Exhibit 87. After the new Atherton High School was opened more blacks attended the new facility than had attended the old facility on Morton Avenue, though it is predominantly white (97%). In fact, attendance figures and the movement of more affluent blacks to the suburbs seem to indicate more blacks will enter this school every year. (Exhibit 62). The attendance zone remained the same as before *Brown I, supra.* We find that the construction of new Atherton was not undertaken nor designed to perpetuate a dual system or to create a racial imbalance.

Iroquois High School, after opening in 1967, had its attendance zone modified in 1971, and moved further away from Manual, thereby requiring more whites to attend Manual and thus maintaining a better racial mix at Manual High School. Iroquois' present mixture is 99% white; however, it must be noted that it is located in an area with few, if any, black inhabitants and a great distance from all other high schools. Exhibit 88.

Male High is a startling example of how population shifts can affect the racial composition of a school. In

1956, it had an enrollment of 1,142 whites and 63 blacks. By 1966, the enrollment was 681 whites and 845 blacks. In 1972, the enrollment was 45 whites and 1,396 blacks.

For the purpose of this case it must not be overlooked that the same neighborhood racial pattern exists, due to population migration. The change in student body composition at Male was not the effect of any zone or attendance district modification by the defendant school board.

The original *Shawnee,* a white girls' high school, became co-educational in 1950-51 and was, until 1962, housed in the present Shawnee Junior High School facility. In 1962, a new Shawnee Senior High facility was built adjacent to Shawnee Junior High, the former facility having become inadequate for a large senior high and a large junior high. In 1968, an addition was added to Shawnee Senior High to accommodate the still growing student population.

The geographic zone for Shawnee Senior was changed before the commencement of the 1971-72 school year, and the ninth grade was added to the Senior High because Shawnee Junior High was overcrowded. The present zone for Shawnee Senior is generally west of Thirty-fourth Street on the east, the Ohio River on the north and west and the Louisville District line on the south. The zone change did not impede desegregation because the next high school to the east is Central. The zone change did result in white children, formerly in the Shawnee district, becoming eligible to attend Central. Traditionally, however, the white children who live in the Portland area (the extreme north-west portion of the district), a predominantly white area, have generally attended Ahrens Trade School (with a present ratio of 30% black and 70% white) for vocational training.

Following the Louisville District's desegregation plan, the Shawnee has had an increasing number of black students every year. In 1956, there were 835 white students and 47 black students. The number of black students con-

sistently increased for the next ten years, creating a majority black situation for the first time in the school year 1966-67, when there were 648 whites and 743 blacks. The number of blacks at Shawnee has continued to increase since the 1966-67 school year where today Shawnee has 49 whites and 908 blacks. The changing student population corresponds with changing racial housing patterns caused by the white exodus from the west end of Louisville.

The Court finds that the zone change at Shawnee in 1971 was not designed to, nor did it, impede desegregation. Moving the line east would only have had the effect of taking eligible white children from the Central district and moving it farther west would only take whites from Shawnee, already then 89% black. The Court finds that there were no racial schemes in the establishment of this new zone line; that it was changed in order to establish a zone for Central and take care of the crowded situation in Shawnee.

Manual High, which shares a common attendance zone with Central High and Male High, experienced in this 1972 school year an enrollment of 993 whites and 589 blacks—yet just five years ago its student population was 1,111 whites and 281 blacks. Thus, we see that even with the infusion of more whites into Manual High from a movement south of the north line of the Iroquois High attendance zone, that Manual, due to population change and movement, with or without the tip ratio, is, in spite of all the Board has done, or can do, short of transportation, becoming rapidly predominantly black in student makeup.

We find that there has been no "gerrymandering" of attendance zones, and that such attendance zone changes as have been made were directed toward better racial balance. We find no invidious discrimination or *de jure* acts on the part of defendant School Board that have contributed to the regrettable racial imbalance.

Junior High and Elementary Schools. In an examination of these types of schools we again discover the like patterns of racial imbalance as was experienced in our analysis of the high schools. DuValle, with 4 whites and 842 blacks in its student body, is located in the southwest portion of the city, in an area that is almost totally black in citizenship. There are no contiguous junior high school zones, nor any junior high school zones within reasonable proximity, for which pairing would be viable and lasting. Cotter Elementary occupies the same plant as DuValle and experiences the same population pattern. Meyzeek Junior High with 1 white and 336 blacks, and Washington Elementary occupy the same plant in the central portion of the city in an area known as Smoketown, which is almost totally black in citizenship. Here again we find no contiguous zones by which racial balance would be improved by pairing. The two closest junior high schools to Meyzeek, i.e., Manly and Woerner, with student racial populations of 363 whites to 646 blacks and 495 whites to 345 blacks, respectively, reflect that a pairing with ~~either of~~ these schools would be counterproductive, even if one disregarded distance and traffic conditions; for if the pairing be with Manly the result would still be a three to one ratio black, and if the paring be with Woerner, the result would be about the same ratio as Woerner possesses anyhow, i.e., 50-50.

Russell Junior High School, with a present student population totally black, and Western Junior High School, with 939 whites and 319 blacks, have contiguous zones. In 1962, Western became overcrowded and to handle the school population the zone was moved closer to Western. Before this change was made, the defendant Board of Education involved the NAACP and the neighborhood and all other persons who evidenced an interest, and the change was effected without objection. We have taken a good hard look at this action, for offhand it appeared that perhaps it would

not stand close scrutiny. We learned, however, that Western serves a black and white area and even the moving of the zone by this Court back toward the Russell school, from whence it was taken, would not infuse additional whites into Russell which is all black and would cause more blacks to attend Western, thus bringing into play the "tilt" and, therefore, be of no lasting consequence. As to all of which, when viewed in the light that the change was made without objection by all interested parties, there appears nothing discriminatory nor *de jure* with respect thereto.

We likewise closely examined a certain complaint about the location of the new Martin Luther King Elementary School, at the time it was in its planning stage. One board member, at least, felt very strongly that King should or could be paired with Shawnee Elementary School under the Princeton Plan. The black population objected and the sponsoring Negro board member, Judge Tucker, one of plaintiffs' witnesses herein, threatened to resign from the board because of the protest. Judge Tucker admitted, however, that the board was willing to attempt the pairing to secure a better balance. This activity took place about 1967. The schools were not paired and by the time King was opened in 1968 both it and Shawnee were predominantly black, 183 whites to 664 blacks, and 288 whites to 438 blacks. So it can be seen that the pairing would have been ineffective insofar as securing any lasting racial balance was concerned, for by 1972 population movement gave King a student population of 23 whites and 907 blacks, and Shawnee Elementary 97 whites and 804 blacks. Nothing lasting was possible.

We find that the junior high school zones and elementary school zones were established and created to serve the neighborhood community in which the particular schools were located, and were not established with any notion or purpose of invidious discrimination, nor to create a dual

school system. In fact, the various zone changes and/or establishment achieved in every instance either more integration or had no negative effect toward racial balance, save one, i.e., the Russell—Western zone above-discussed.

* * * * * * * * *

CONCLUSION

We have examined and viewed the evidence in this entire matter "from its four corners."

No one can seriously dispute that the Louisville Independent School District moved with dispatch and diligence to integrate its schools and faculty following *Brown I*, as evidenced by what in fact did occur, as hereinabove factually found by us.

Likewise, no one can seriously dispute that during the ensuing years, particularly since 1965, regrettable racial imbalance did indeed begin its catena; however, such imbalance did not germinate from, nor has it proliferated from, any acts or failures to act by school or state authorities. The proliferation has been the result, in spite of efforts of resistence by the defendant Board, of white flight, neighborhood housing patterns and socio-economic factors; not *de jure* acts or failures to act.

So we come to the legal determination of whether or not, under these facts, the adoption by us of "the useful tool of transportation," its expense, inconvenience and accompanying problems, is constitutionally mandated of us, merely and solely for the purpose of obviating racial imbalance, (keeping in mind that in this case plaintiffs made no contention of inequality of schools or substandard education or instruction). We think not.

Brown I, supra, required the dismantling of dual school systems and the creation of unitary school systems. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), however deals quite especially with the duty of

school authorities to eleminate racially separate schools maintained by state action and the powers of federal courts to order such measures as are necessary to effect complete desegregation immediately. We interpret the *Swann* opinion to pronounce that the federal court is precluded, by Title 4 of the Civil Rights Act of 1964, 42 U.S.C. Section 2,000c, and by unanimous opinions of the Supreme Court, from imposing upon school authorities the affirmative duty to cure racial imbalance in situations where that imbalance *is caused by the de facto conditions.* Conversely, we believe that it is apparent in *Swann, supra,* that it is the duty of school boards to come forward with a plan that promises realistically to work in those cases in which it can be demonstrated that there are vestiges of state imposed segregation maintained by the boards' action, policies or inactivity. *Swann* plainly teaches that school authorities may indeed have the power to formulate and implement educational policy which would include a prescribed ratio of black to white students reflecting the proportion for the district as a whole. But *Swann, supra,* page 16, says plainly:

> "To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a Federal Court."

Recognizing as we do that schools predominantly of one race in a district of mixed population require close scrutiny to determine that school assignments are not part of state enforced segregation, we nevertheless recognize that the Supreme Court determined the existence of some small number of one race or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law.

We find that the school officials have been aware of the responsibilities imposed upon them by the advancing state

of the law as it has developed by the courts since *Brown I.* We find that they have undertaken to comply with the letter and the spirit of the law and that there is not at this time any constitutional violation of the rights of the plaintiffs or any other children in the defendant Louisville school system *and that the system is a unitary system.*

From what we have said hereinabove, it follows that we need not consider further the principal claims that there can be no complete elimination of vestiges of state imposed segregation in the Louisville system unless such system is merged in whole or in part with the Jefferson County system.

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(s) James F. Gordon
United States District Judge

Dated: March 8, 1973

Copies to:
Counsel of record.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 76-2301

John E. Haycraft, Et Al. - - *Plaintiffs-Appellees*

v.

Board of Education of Jefferson County, Kentucky, Et Al. - - *Defendants-Appellants*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

Decided and Filed August 23, 1977

OPINION

Before: PHILLIPS, Chief Judge, and PECK and ENGEL, Circuit Judges.

PECK, Circuit Judge. This latest aspect of the Louisville school desegregation case commenced in May of 1976, when District Judge Gordon conducted hearings concerning implementation of the July 30, 1975, desegregation plan and order approved by this Court in *Cunningham* v. *Grayson*, 541 F. 2d 538 (6th Cir. 1976).

As a result of the May 1976 evidentiary hearings, Judge Gordon determined that the pupil population ratio in at least 28 elementary schools did not satisfactorily reflect the racial guidelines set forth in the July 30, 1975, desegregation order. Appellants do not dispute this finding on

appeal. Having found that "the elementary school system in Jefferson County has *never* been in compliance with this Court's desegregation decision," and that this failure of compliance rendered the case outside the scope of *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976), the district court, on August 2, 1976, entered an amended order, which *inter alia*, altered the pupil assignment methodology of the July 30, 1975, desegregation order by requiring the busing of an additional 900 black pupils.[1] The Board of Education of Jefferson County appeals from this August 2, 1976, amended desegregation order.

On appeal the Board of Education maintains that the district court exceeded its remedial powers in amending the plan without making any determination that the racial imbalance in these 28 elementary schools resulted from any additional segregative action on the part of the Board. This is, appellants argue, the precise issue resolved by *Pasadena*. We do not agree.

In the *Pasadena* case, the district court entered a desegregation order on January 23, 1970, requiring assignment of students in such a manner that no school within the district would have a majority of minority students (the "no majority" requirement). Only during the 1970-71 school year was the "no majority" requirement met. Thereafter, in 1974, the Board of Education sought to be relieved of the "no majority" requirement and the district court denied its motion. The Supreme Court reversed the decision of the district court, quoting *Swann* v. *Board of Education*, 402 U. S. 1, 31-32 (1971):

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[1] In this amended order, the district court also approved the report of a Special Committee, appointed May 6, 1976, and in conformity therewith, ordered implementation of procedures for hardship transfers and ordered the school board to keep open five elementary schools scheduled to be closed; and adopted the Board's recommended voluntary transfer plan.

"Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies *once the affirmative duty to desegregate has been accomplished* and racial discrimination through official action is eliminated from the system." *Pasadena, supra* at 436 (Emphasis added).

We conclude that the district court correctly determined that *Pasadena* is distinguishable from the instant case. This case is in the pre-compliance rather than the post-compliance stage of implementation of *Pasadena*. As the Supreme Court has held "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Board of Education, supra* at 15. We agree with the district court's conclusion that nothing in *Pasadena* restricts its remedial powers so as to preclude modification of the student assignment portion of a desegregation plan, which had *not*, as of the time the modifications were ordered, brought about the desegregation of the school system. See, *United States* v. *Seminole County School District*, ____ F. 2d ____ (No. 76-2749, 5th Cir., June 13, 1977).

The judgment of the district court is affirmed.